

6-2021

## The Rule of Law: A Necessary Pillar of Free and Democratic Societies for Protecting Human Rights

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### Network Recommended Citation

John Bessler, *The Rule of Law: A Necessary Pillar of Free and Democratic Societies for Protecting Human Rights*, 61 Santa Clara Law Review 467 (2021).

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## THE RULE OF LAW: A NECESSARY PILLAR OF FREE AND DEMOCRATIC SOCIETIES FOR PROTECTING HUMAN RIGHTS

John D. Bessler\*

*This essay traces the history and development of the concept of the Rule of Law from ancient times through the present. It describes the elements of the Rule of Law and its importance to the protection of human rights in a variety of contexts, including under domestic and international law. From ancient Greece and Rome to the Enlightenment, and from the American and French Revolutions to modern times, the Rule of Law has played a key role in societies around the world. The essay discusses definitions of the Rule of Law, its origins, and its development over time, including in Europe, America's founding period, and the post-World War II era. In particular, the essay discusses the intellectual contributions of historical figures such as the Italian criminal-law theorist Cesare Beccaria, the French jurist, Baron de Montesquieu, and American revolutionaries who played major roles in laying the now centuries-old foundation for the development of the modern-day Rule of Law concept (i.e., in drafting early American constitutions and laws, including the U.S. Constitution and its Bill of Rights). The essay explores a wide range of topics, from the creation of the United Nations and the ratification of international conventions and human rights treaties, to the adoption of South Africa's post-apartheid constitution, to Donald Trump's continuous and systematic assault on the Rule of Law, human rights, and democratic institutions and norms. The essay also highlights the Rule of Law's symbiotic relationship to the protection of fundamental human rights such as the rights to equality, to vote, and to be free from discrimination, cruelty and torture. Arguing that various Trump Administration acts and policies (e.g., separating children from their parents at the U.S.-Mexico border and the death penalty's use) and the outrageous and brazen efforts of Donald Trump and his campaign and allies to discriminate against and disenfranchise*

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*voters violate core Rule of Law principles, the essay concludes by emphasizing the Rule of Law's continuing and critical importance to the protection of civil liberties and fundamental human rights in the twenty-first century.*

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## I. INTRODUCTION

Donald Trump and his administration routinely violated people's human rights,<sup>1</sup> including those of asylum seekers,<sup>2</sup> refugees,<sup>3</sup> minorities,<sup>4</sup> and migrant parents and their children at the U.S.-Mexico border.<sup>5</sup> In the 2020 presidential election, Donald Trump's failed but

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1. See, e.g., Linda Greenhouse, Opinion, *Four Years of the Trump Administration in Court. One Word Stuck in My Head.*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/11/19/opinion/trump-policy-mean.html> ("During four years struggling to keep up with the flood of court cases challenging the refusal by various Trump administration officials to follow the law, a word has come to mind so often that I can't shake it. It's the word 'mean.' There's a meanness to the man and to the policies issued from the sycophantic bubble that passes for his administration."); Jasmine Aguilera, *Judge Requires the Government to Explain Why Undisclosed Data on Missing Separated Parents Was Not Provided Sooner*, TIME (Dec. 3, 2020, 6:30 PM), <https://time.com/5917728/separated-families-border-data-government/> ("A federal judge is now requiring the government to provide an explanation as to why data on missing separated parents was not disclosed at an earlier date. The data includes phone numbers and addresses that could help locate some of the more than 600 parents who have still not been found after they were separated from their children at the southern U.S. Border between 2017 and 2018."); Bill Frelick, *The Trump Administration's Final Insult and Injury to Refugees*, HUM. RTS. WATCH (Dec. 11, 2020, 6:00 AM), <https://www.hrw.org/news/2020/12/11/trump-administrations-final-insult-and-injury-refugees> ("The administration of US President Donald Trump chose Human Rights Day—December 10—to finalize what has come to be known as its 'death to asylum' rule . . . Now scheduled to go into effect on January 10, the rule creates insurmountable procedural barriers, evidentiary burdens, and qualification standards to prevent three groups, especially, from being able to exercise their right to seek and enjoy asylum in the United States: Central Americans fleeing gang violence; women and others fleeing domestic abuse; and people fleeing persecution on the basis of sexual orientation or gender identity.").

2. See Rebecca Rainey, *Trump issues sweeping new curbs on asylum eligibility*, POLITICO (Dec. 10, 2020, 4:21 PM), <https://www.politico.com/news/2020/12/10/trump-issues-sweeping-new-curbs-on-asylum-eligibility-444429>.

3. See, e.g., Reuters Staff, *Trump administration sets record low limit for new U.S. Refugees*, REUTERS (Oct. 28, 2020, 5:31 AM), <https://www.reuters.com/article/us-usa-immigration-refugees/trump-administration-sets-record-low-limit-for-new-u-s-refugees-idUSKBN27D1TS> ("The Trump administration has slashed the number of refugees it will allow to resettle in the United States in the coming year, capping the number at 15,000, a record low in the history of the country's modern refugee program.").

4. See Press Release, NAACP, NAACP Sues President Trump For Systematically Trying To Disenfranchise Black Voters (Dec. 22, 2020), <https://naacp.org/latest/naacp-sues-president-trump-for-systematically-trying-to-disenfranchise-black-voters/> (quoting Derrick Johnson, the NAACP's president, as saying, "President Trump and his allies have repeatedly and unsuccessfully tried to overturn the 2020 presidential election results and undermine confidence in our democracy. Across the country—from Detroit to Milwaukee, and Atlanta to Philadelphia—they have targeted areas with large numbers of Black voters and made baseless, racist claims to attempt to not count their votes.").

5. Emily Cohodes et al., Opinion, *Op-Ed: The crime against migrant children that Biden needs to repair*, L.A. TIMES (Dec. 8, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-12-08/immigration-family-separation-policy-trump-administration> ("More than 5,400 children have been detained and separated from their parents at the U.S.-Mexico border by the Trump administration since 2017. Many families remain separated, and the violence of this policy has been compounded by the government's failure to keep track of the families it tore apart as it sent children to shelters all over the

systematic, anti-democratic efforts to disenfranchise voters,<sup>6</sup> including even *after* the November 3rd election,<sup>7</sup> only confirmed Donald Trump's total disdain for individual rights and the Rule of Law.<sup>8</sup> Notoriously, on January 2, 2021, in a recorded, hour-long telephone call with Brad Raffensperger, Georgia's Republican Secretary of State, Trump brazenly threatened him and his lawyer with criminal prosecution and demanded that he "find 11,780 votes."<sup>9</sup>

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country and then deported their parents."); Daniel Gonzalez, *628 parents of separated children are still missing. Here's why immigrant advocates can't find them.*, USA TODAY (Dec. 11, 2020, 1:52 PM), <https://www.usatoday.com/story/news/nation/2020/12/11/immigrant-advocates-cant-locate-parents-separated-border-children/3896940001/> (discussing the Trump Administration's "notorious family separation policy").

6. See *Just over a week before the US election, lawsuits linger*, ASSOCIATED PRESS (Oct. 23, 2020), <https://apnews.com/article/election-2020-joe-biden-donald-trump-virus-outbreak-voting-1c9d23ce9ff7d3b81d41874bfb49b637> ("Hundreds of lawsuits about voting have been filed before the Nov. 3 election. The cases concern the fundamentals of the American democratic process, including how ballots are cast and counted. Some of the challenges are being fronted by legal teams working for President Donald Trump and Democratic challenger Joe Biden."); see also Noah Pransky, *Postal Service Delays Disenfranchised Thousands of Legally-Cast Ballots This Fall*, NBC WASH. (Dec. 3, 2020), <https://www.nbcwashington.com/lx/postal-service-delays-disenfranchised-thousands-of-legally-cast-ballots-this-fall/2495351/>.

7. Joan Biskupic, *Trump's bid to disenfranchise millions by threatening democracy is going nowhere in court*, CNN (Dec. 8, 2020, 9:07 PM), <https://www.cnn.com/2020/12/08/politics/trump-biden-democracy-election-supreme-court/index.html>; Jacob Shamsian, *Trump's lawsuits are trying to throw out votes in counties with more Black people—even when they played by the same election rules as predominantly white ones*, BUS. INSIDER (Dec. 14, 2020, 2:09 PM), <https://www.businessinsider.com/trump-election-lawsuits-target-black-voters-2020-12>.

8. Bryan H. Wildenthal, *Republicans, the Rule of Law, and the Fate of American Democracy*, JURIST (Nov. 29, 2020, 3:42 PM), <https://www.jurist.org/commentary/2020/11/bryan-wildenthal-republicans-law-american-democracy/>; Eric Levitz, *Trump Is Growing the GOP's 'Anti-Rule of Law' Wing*, N.Y. MAG. (Dec. 10, 2020), <https://nymag.com/intelligencer/2020/12/pa-gop-letter-anti-mask-protests-oath-keepers.html> (observing that "by using the bully pulpit to encourage far-right groups' violations of COVID-19 public-health restrictions, to preach conspiracies about Democratic plots to foment 'invasions' of the U.S. by criminal migrants, and to contest the legitimacy of his defeat in the 2020 election," Donald Trump "helped grow the Republican Party's 'anti-rule of law' wing considerably").

9. Amy Gardner & Paulina Firozi, *Here's the full transcript and audio of the call between Trump and Raffensperger*, WASH. POST (Jan. 5, 2021, 10:15 AM), [https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html); see also Quinn Scanlan, Devin Dwyer & Olivia Rubin, *Georgia election officials formally launch investigation into Trump phone calls*, ABC NEWS (Mar. 15, 2021, 6:27 PM), <https://abcnews.go.com/Politics/georgia-election-officials-formally-launch-investigation-trump-phone/story?id=75760557>; Sara Murray & Jason Morris, *Georgia prosecutor investigating Trump hires new evidence expert*, CNN (Mar. 17, 2021, 2:43 AM), <https://www.cnn.com/2021/03/16/politics/georgia-trump-investigation-evidence-expert-hired/index.html> (noting that the Atlanta-area district attorney opened an investigation into

The frontal assault on the integrity of American elections and the Rule of Law culminated in the chaotic events of January 6, 2021, when Donald Trump, who for weeks after losing the election had falsely claimed victory,<sup>10</sup> delivered an incendiary speech on the Ellipse in front of the White House.<sup>11</sup> In that speech, he called the election “rigged,” said it had been “stolen” by “radical left Democrats” and “the fake news media,” and emphasized, “We will never concede.”<sup>12</sup> At an event in which Representative Mo Brooks of Alabama yelled, “Today is the day American patriots start taking down names and kicking ass!”, and in which Trump’s lawyer, Rudy Giuliani, called for “trial by combat,”<sup>13</sup> Trump urged Vice President Mike Pence—the public official tasked with presiding over the ministerial counting of state-certified Electoral College votes<sup>14</sup>—to do “the right thing” and “send it back to the States to recertify” and to “come through for us.”<sup>15</sup> “[I]f Mike Pence does the right thing, we win the election,” Trump told the raucous crowd, eliciting cheers.<sup>16</sup>

Calling on his supporters to “protect our constitution,” attacking “weak Republicans,” and accusing Democrats of “election fraud” and “theft,” Trump vehemently demanded that Congress “confront this egregious assault on our democracy.”<sup>17</sup> “We’re going to walk down to

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Donald Trump’s “attempts to influence the administration of the 2020 Georgia general election”).

10. See Dan Barry & Sheera Frenkel, *‘Be There. Will Be Wild!’: Trump All but Circled the Date*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html>; see also Lauren Koenig, *Several people stabbed and 33 arrested as ‘Stop the Steal’ protesters and counterprotesters clash in Washington, DC*, CNN (Dec. 13, 2020, 6:13 PM), <https://www.cnn.com/2020/12/12/us/stop-the-steal-protest-washington-dc-trnd/index.html>.

11. Donald Trump Speech “Save America” Rally Transcript January 6, REV (Jan. 6, 2021), <https://www.rev.com/blog/transcripts/donald-trump-speech-save-america-rally-transcript-january-6> (containing a transcript of Donald Trump’s speech).

12. *Id.* Even before the November 2020 election, Trump had a long history of saying, without evidence, that an election was “rigged” or “stolen.” Terrance Smith, *Trump has longstanding history of calling elections ‘rigged’ if he doesn’t like the results*, ABC NEWS (Nov. 11, 2020, 2:24 AM), <https://abcnews.go.com/Politics/trump-longstanding-history-calling-elections-rigged-doesnt-results/story?id=74126926>.

13. Aaron Rupar, *How Trump’s speech led to the Capitol riot*, VOX (Jan. 8, 2021, 2:10 PM), <https://www.vox.com/22220746/trump-speech-incite-capitol-riot>; Ryan Grenoble, *Rudy Giuliani Called for ‘Trial by Combat’ Before Wednesday’s Violence*, HUFFPOST (Jan. 7, 2021, 3:23 PM), [https://www.huffpost.com/entry/rudy-giuliani-trial-by-combat\\_n\\_5ff74985c5b6644fa210657b](https://www.huffpost.com/entry/rudy-giuliani-trial-by-combat_n_5ff74985c5b6644fa210657b).

14. Jordan Fabian, *Pence Hits Breaking Point With Trump in Blessing Biden Win*, BLOOMBERG (Jan. 7, 2021, 12:55 AM), <https://www.bloomberg.com/news/articles/2021-01-07/pence-hits-breaking-point-with-trump-in-blessing-biden-win>.

15. Donald Trump, *supra* note 11.

16. Trump: *If Pence ‘does the right thing, we win’*, ASSOCIATED PRESS (Jan. 6, 2021), <https://news.yahoo.com/trump-pence-does-thing-win-181802824.html>.

17. Donald Trump, *supra* note 11.

the Capitol,” Trump declared, telling the worked-up crowd, “You have to show strength, and you have to be strong,” and “if you don’t fight like Hell, you’re not going to have a country anymore.”<sup>18</sup> After being fed a steady diet of conspiracy theories and lies about the November 2020 election, Trump’s die-hard supporters then marched up Pennsylvania Avenue to the U.S. Capitol.<sup>19</sup> There, a lawless mob, many wearing MAGA hats and some carrying Trump and Confederate flags,<sup>20</sup> violently breached Capitol security, leading to scores of injuries,<sup>21</sup> loss of life,<sup>22</sup> and the theft and destruction of property.<sup>23</sup> With members of Congress forced to evacuate the House and Senate chambers and compelled to

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18. *Id.*

19. Joe Strupp, ‘This country is torn apart’: Jackson man who traveled to D.C. to support Trump, ASBURY PARK PRESS (Jan. 7, 2021, 5:00 AM), <https://www.app.com/story/news/2021/01/07/jackson-man-who-witnessed-d-c-melee-blames-democrats/6574305002/>.

20. Robin Abcarian, Opinion, *Column: We can be outraged, saddened, terrified. But we can’t be surprised by what happened in D.C.*, L.A. TIMES (Jan. 6, 2021, 3:19 PM), <https://www.latimes.com/opinion/story/2021-01-06/capitol-riot-violence-trump-election>; Eliot C. McLaughlin, *Before Wednesday, insurgents waving Confederate flags hadn’t been within 6 miles of the US Capitol*, CNN (Jan. 7, 2021, 2:44 PM), <https://www.cnn.com/2021/01/07/us/capitol-confederate-flag-fort-stevens/index.html>; Javonte Anderson, *Capitol riot images showing Confederate flag a reminder of country’s darkest past*, USA TODAY (Jan. 7, 2021, 8:58 PM), <https://www.usatoday.com/story/news/2021/01/07/capitol-riot-images-confederate-flag-terror/6588104002/>.

21. Jennifer Elias et al., *More than 50 police officers were hurt at pro-Trump riot at the Capitol that also killed 4*, CNBC (Jan. 7, 2021, 12:19 AM), <https://www.cnbc.com/2021/01/07/four-dead-after-pro-trump-rioters-storm-capitol.html>; see also Michael S. Schmidt & Luke Broadwater, *Officers’ Injuries, Including Concussions, Show Scope of Violence at Capitol Riot*, N.Y. TIMES (Apr. 2, 2021), <https://www.nytimes.com/2021/02/11/us/politics/capitol-riot-police-officer-injuries.html> (“The Capitol assault resulted in one of the worst days of injuries for law enforcement in the United States since the Sept. 11, 2001, terrorist attacks. At least 138 officers—73 from the Capitol Police and 65 from the Metropolitan Police Department in Washington—were injured, the departments have said.”).

22. Evan Perez & Paul LeBlanc, *Federal murder investigation to be opened in Capitol Police officer’s death*, CNN (Jan. 8, 2021, 5:51 PM), <https://www.cnn.com/2021/01/08/politics/capitol-police-officer-killed/index.html>.

23. Wilson Wong, *Shattered glass, ransacked offices: Images of damage at U.S. Capitol left by pro-Trump mob*, NBC NEWS (Jan. 7, 2021, 10:10 AM), <https://www.nbcnews.com/news/us-news/shattered-glass-ransacked-offices-images-damage-u-s-capitol-left-n1253302>; Ebony Bowden, *Capitol protesters loot, vandalize Nancy Pelosi’s office*, N.Y. POST (Jan. 6, 2021, 5:09 PM), <https://nypost.com/2021/01/06/capitol-protesters-loot-vandalize-nancy-pelosis-office/>; Morgan Gstalter, *Merkley says Capitol rioters stole laptop from his office*, HILL (Jan. 7, 2021, 1:33 PM), <https://thehill.com/homenews/senate/533162-merkley-says-capitol-rioters-stole-laptop-from-his-office>.

wear gas masks,<sup>24</sup> the people's business—the counting of Electoral College votes—was delayed for several hours.<sup>25</sup>

In the wake of the failed insurrection, appeals for the restoration of “the Rule of Law” were heard in many quarters, including from then President-Elect Joe Biden's transition team.<sup>26</sup> The somewhat amorphous, but much-invoked concept of the Rule of Law, though

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24. Associated Press, *House members told to don gas masks as protesters breach US Capitol, one person shot: Latest updates*, CLEVELAND.COM (Jan. 6, 2021), <https://www.cleveland.com/nation/2021/01/house-members-told-to-don-gas-masks-at-capitol-latest-updates.html>.

25. Kristine Phillips et al., *'A colossal failure': How were pro-Trump rioters able to breach Capitol security?*, USA TODAY (Jan. 6, 2021, 5:17 PM), <https://www.usatoday.com/story/news/politics/2021/01/06/how-were-pro-trump-rioters-able-breach-capitol-law-enforcement/6568796002/>; Jeremy Herb et al., *Congress completes electoral count, finalizing Biden's win after violent delay from pro-Trump mob*, CNN (Jan. 7, 2021, 3:41 AM), <https://www.cnn.com/2021/01/06/politics/2020-election-congress-electoral-college-vote-count/index.html>.

26. Reuters Staff, *Biden vows to restore faith in U.S. law with Justice Dept nominees*, REUTERS (Jan. 7, 2021, 3:32 AM), <https://www.reuters.com/article/us-usa-biden-attorney-general/biden-vows-to-restore-faith-in-u-s-law-with-justice-dept-nominees-idUSKBN29C1FY>. One newspaper editorial called the storming of the U.S. Capitol a “repugnant assault on the rule of law.” Times Leader, Opinion, *Our View: A repugnant assault on the rule of law*, TIMES LEADER (Jan. 6, 2021), <https://www.timesleader.com/opinion/815457/our-view-a-repugnant-assault-on-the-rule-of-law>.



variously conceived<sup>27</sup> and defined over the years,<sup>28</sup> has been aptly characterized by the United Nations in this way: “A principle of

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27. “The rule of law,” one commentator has written, “takes on various conceptions, often characterized as ‘thick’ and ‘thin’ conceptions.” Noah Bialostozky, *The Misuse of Terrorism Prosecution in Chile: The Need for Discrete Consideration of Minority and Indigenous Group Treatment in Rule of Law Analyses*, 6 NW. J. INT’L HUM. RTS. 81, 84 n.20 (2007); *see also id.* (“[T]he basic principles of a ‘thin’ conception are threshold requirements that are common to all conceptions of the rule of law. Thick conceptions of the rule of law begin with the basic principles of a thin conception but then incorporate other elements such as particular conceptions of human rights, economic arrangements, forms of government, etc. The United Nations has defined the rule of law as including the basic principles described but also requires that laws are consistent with international human rights norms and standards.”) (citations omitted); Robert A. Stein, *What Exactly Is the Rule of Law?*, 57 HOUS. L. REV. 185, 196 (2019) (“A distinction has been drawn in some recent writings between a ‘thin’ rule of law and a ‘thick’ rule of law. A thin rule of law describes governance in a society in which many of the procedural principles of the rule of law are observed, but not the elements of substantive justice and protection of human rights. An example would be a society that has a system of laws governing all of its citizens and an efficient court system to enforce those laws, but the system does not include a robust protection of human rights. A thick rule of law, by contrast, is governance under a rule of law that includes all of the principles of the rule of law, including those related to substantive justice and enforcement of human rights protections.”); King Fung Tsang, *China’s Rule of Law from a Private International Law Perspective*, 47 GA. J. INT’L & COMP. L. 93, 103 (2018) (“[T]he ‘thin’ theory of the rule of law focuses on the procedural aspects of the rule of law, while the ‘thick’ theory of the rule of law takes a further step in stipulating the substantive content of the law. This is one of the biggest debates on what constitutes rule of law. If a country has a consistent, clear, and efficient legal system, will that alone be sufficient to qualify it as a country with rule of law? Or does it take more, such as the protection of fundamental human rights to earn that badge of honor?”); Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 340-41 (2008) (“The content of the term ‘rule of law,’ then, remains contested across both time and geography. Analysis of its content often begins by parsing out formal and substantive understandings. Those theories that emphasize the formal aspects describe instrumental limitations on the exercise of State authority; they tend to be minimalist, positivist, and are often referred to as ‘thin’ theories—distinguishing them from the ‘thick’ theories that incorporate substantive notions of justice. The latter conceive the rule of law more broadly as a set of ideals, whether understood in terms of protection of human rights, specific forms of organized government, or particular economic arrangements such as free market capitalism. Ronald Dworkin has referred to the two conceptions as the ‘rule-book’ model and a ‘rights’ model, respectively . . . .”).

28. *E.g.*, Michael F. Duggan, *The Open Hand: Moderate Realism and the Rule of Law*, 61 HOW. L.J. 271, 272 n.4 (2018) (“One of the most difficult tasks in approaching the rule of law is simply to define it.”); *id.* (“Supreme Court Associate Justice Anthony Kennedy has suggested a provisional definition of The Rule of Law with three elements: 1. The law is superior to, and thus binds, the governed and all its officials. 2. The Law must respect and preserve the dignity, equality, and human rights of all persons . . . 3. The Law must establish and safeguard the constitutional structures to be a free society in which all citizens have a meaningful voice in shaping and enacting rules that govern them. The Law must devise and maintain systems to advise all persons of their rights, and it must empower them to fulfill just expectations and seek redress of grievances without fear of penalty or retaliation.”); *id.* (“An even more general definition of the rule of law can be found in the U.S. Citizens Immigration Services (USCIS) Citizenship Exam. Question 12 asks, ‘What is the rule of law?’ and then answers in four parts: ‘Everyone must follow the law; leaders must obey the law; government must obey the law; no one is above the law.’ ”); John Mukum Mbaku, *Threats to the Rule of Law in Africa*, 48 GA. J. INT’L & COMP. L. 293, 306 (2020) (“Throughout the years, many

governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”<sup>29</sup> In nominating Judge Merrick Garland on January 7, 2021, to serve as the Attorney General of the United States to restore confidence in the U.S. Department of Justice, and with urgent calls for Donald Trump’s impeachment and removal from office swirling about Capitol Hill and the country,<sup>30</sup> then President-Elect Joe Biden observed: “The past four years we’ve had a president who’s made his contempt for

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legal and constitutional scholars have contributed to the definition of the rule of law . . . The rule of law is ‘typically contrasted with arbitrary exercise of power.’ ”); *id.* at 312 (“Professor John Mitchell Finnis, an international expert on jurisprudence and legal philosophy, has argued that the rule of law is ‘[t]he name commonly given to the state of affairs in which a legal system is legally in good shape.’ He argues further: ‘A legal system exemplifies the Rule of Law to the extent . . . that (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; that (iii) its rules are promulgated, (iv) clear, and (v) coherent one with another; that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules; that (vii) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and that (viii) those people who have authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor.’ ”); *cf.* W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275, 336-37 (2017) (“The rule of law is a highly contested concept. It is sometimes used loosely to refer [to] a good government under law, such as one characterized by the existence of strong property rights and investor protections, which may correlate with the size of a country’s capital markets, or protection for human dignity and human rights. The rule of law or legality may also refer to formal features a legal system ought to have, such as laws that are publicly promulgated, clear and understandable, openly and impartially administered, and at the very least capable of being obeyed.”).

29. NATASHA M. EZROW ET AL., *DEVELOPMENT AND THE STATE IN THE 21ST CENTURY: TACKLING THE CHALLENGES FACING THE DEVELOPING WORLD* 77 (2015). As the U.N. definition of *Rule of Law* further provides: “It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” *Id.* (quoting *What is the Rule of Law*, UNITED NATIONS, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (last visited Mar. 8, 2021)).

30. Lauren Fox et al., *Democratic momentum builds for potential fast-track impeachment next week*, CNN (Jan. 8, 2021, 9:41 PM), <https://www.cnn.com/2021/01/08/politics/house-democrats-impeachment-plans/index.html>; *see also* Michael Warren & Jamie Gangel, *Multiple Republicans are considering supporting impeachment, sources say*, CNN (Jan. 8, 2021, 5:44 PM), <https://www.cnn.com/2021/01/08/politics/capitol-hill-republicans-impeachment-removal-trump/index.html>; Nathan Bomey, *Pence should consider invoking 25th Amendment to remove Trump, business ally of the president says*, USA TODAY (Jan. 6, 2021, 5:33 PM), <https://www.usatoday.com/story/money/2021/01/06/25th-amendment-mike-pence-donald-trump-capitol-hill/6571535002/>; Darlene Superville et al., *Biden introduces Merrick Garland as attorney general pick*, ASSOCIATED PRESS (Jan. 7, 2021), <https://apnews.com/article/merrick-garland-attorney-general-da64618113cbcc82c61e855f9162cf2e>.

our democracy, our Constitution, the rule of law, clear in everything he has done.” “More than anything,” Biden said, “we need to restore the honor, the integrity, the independence of the Department of Justice that’s been so badly damaged.”<sup>31</sup>

Lawsuits filed by the American Civil Liberties Union,<sup>32</sup> the NAACP,<sup>33</sup> and other groups exposed—and sought to remedy as best they could—the traumatic, discriminatory and often irreversible harm caused by Donald Trump and the Trump Administration’s mean-spirited and unlawful policies.<sup>34</sup> And thankfully, along with state governors, secretaries of state, and local canvassing board members who respected the will of voters,<sup>35</sup> America’s independent judiciary—from state

31. Superville et al., *supra* note 30.

32. Michelle Wiley, ‘Disturbing’: Judge Asks Trump Administration to Explain Why It Withheld Contact Information for Separated Migrant Parents, KQED (Dec. 4, 2020), <https://www.kqed.org/news/11849630/disturbing-judge-asks-trump-administration-to-explain-why-it-withheld-contact-information-for-separated-migrant-parents> (“Earlier this week, the American Civil Liberties Union announced that the administration had finally provided a tranche of phone numbers and addresses needed to help reunite hundreds of families, information advocates had been requesting for nearly a year.”).

33. Press Release, NAACP, NAACP Sues Postmaster General of the United States Postal Service to Restore Reliable Mail Delivery Ahead of November Elections (Aug. 20, 2020), <https://www.naacp.org/latest/naacp-sues-postmaster-general-united-states-postal-service-restore-reliable-mail-delivery-ahead-november-elections/>; Harper Neidig, *NAACP files suit accusing Trump, GOP of violating KKK Act*, HILL (Dec. 22, 2020, 11:37 AM), <https://thehill.com/homenews/campaign/531277-naacp-files-suit-accusing-trump-gop-of-violating-kkk-act>.

34. Dennis Romero, *Federal judge rules acting DHS head Chad Wolf unlawfully appointed, invalidates DACA suspension*, NBC NEWS (Nov. 14, 2020, 2:21 PM), <https://www.nbcnews.com/politics/immigration/federal-judge-rules-acting-dhs-head-chad-wolf-unlawfully-appointed-n1247848>; Dorothy Atkins, *Feds Admit To Expelling 34 Migrant Kids Despite Injunction*, LAW360 (Dec. 14, 2020, 4:52 PM), <https://www.law360.com/articles/1337460>; Julia Ainsley & Jacob Soboroff, *Advocates, mental health experts pressure Biden to commit to reuniting separated families in the U.S.*, NBC NEWS (Dec. 9, 2020, 11:14 AM), <https://www.nbcnews.com/politics/immigration/advocates-mental-health-experts-pressure-biden-commit-reuniting-separated-families-n1250540> (“The Trump administration separated more than 3,000 migrant families as part of its 2018 ‘zero tolerance policy’ and a 2017 pilot program. Recent court filings from pro-bono lawyers tasked with finding the separated families revealed the parents of 628 children who were separated under Trump administration policies in 2017 and 2018 have still not been found. And the lawyers believe two-thirds of them have been deported.”); Amanda Holpuch, *Trump’s separation of families constitutes torture, doctors find*, GUARDIAN (Feb. 25, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/feb/25/trump-family-separations-children-torture-psychology> (“The trauma Donald Trump’s administration caused to young children and parents separated at the US-Mexico border constitutes torture, according to evaluations of 26 children and adults by the group Physicians for Human Rights (PHR).”).

35. Kristen Holmes & Veronica Stracqualursi, *Trump pressured Georgia governor in call to help overturn Biden’s win in state*, CNN (Dec. 5, 2020, 9:13 PM), <https://www.cnn.com/2020/12/05/politics/trump-georgia-brian-kemp-phone-call/index.html>; Sophia Ankel, *The Republican Secretary of State for Georgia says Trump ‘should leave quietly’ after state’s election recount confirmed Biden’s win*, BUS. INSIDER (Nov. 29, 2020,

supreme courts<sup>36</sup> to federal district court and circuit court judges<sup>37</sup> to U.S. Supreme Court justices<sup>38</sup>—flatly rejected Donald Trump’s nefarious scheme to set aside the will of tens of millions of voters in the 2020 presidential election.<sup>39</sup> As Laurence Tribe and Joseph Grodin, emeritus law professors at Harvard and UC–Hastings, wrote in a post-election op-ed for the *Boston Globe*:

President Trump’s cynical effort to enlist the courts in his attempt to retain power has failed miserably. Claims of voter fraud and other theories advanced on his behalf have consistently been rebuffed by judges of all political backgrounds, including judges with conservative reputations and federal judges appointed by Republican presidents—including Trump himself.<sup>40</sup>

In fact, in the wake of the U.S. Supreme Court’s terse December 11, 2020 order summarily rejecting the Texas Attorney General’s baseless lawsuit<sup>41</sup> seeking to overturn the election results in Georgia,

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2:55 AM), <https://www.businessinsider.com/georgia-trump-lost-he-should-leave-quietly-says-brad-raffensperger-2020-11>; Ari Berman, *In a Blow to Trump, Michigan’s Canvassing Board Certifies Election Results*, MOTHER JONES (Nov. 23, 2020), <https://www.motherjones.com/politics/2020/11/michigan-certification/>.

36. E.g., Vanessa Romo, *Wisconsin Supreme Court Rules Trump Election Challenge ‘Unreasonable In The Extreme’*, NPR (Dec. 14, 2020, 5:17 PM), <https://www.npr.org/2020/12/14/946463134/wisconsin-supreme-court-rules-trump-election-challenge-unreasonable-meritless>.

37. E.g., Kyle Cheney & Josh Gerstein, *‘Voters, not lawyers, choose the president’: Appeals court shoots down Trump suit in Pennsylvania*, POLITICO (Nov. 27, 2020, 1:19 PM), <https://www.politico.com/news/2020/11/27/appeals-court-trump-campaign-pennsylvania-440813>.

38. Nina Totenberg, *Supreme Court Rejects Texas’ Lawsuit Over Election Results*, NPR (Dec. 11, 2020, 7:15 PM), <https://www.npr.org/2020/12/11/945705839/supreme-court-rejects-texas-lawsuit-over-election-results>.

39. The 2020 presidential election was hotly contested, but the Democratic candidate, Joe Biden, decisively won both the popular and the Electoral College vote. While Donald Trump garnered more than 74 million votes, Joe Biden got more than 81 million votes, the highest vote total ever recorded in U.S. history and a number surpassing his Republican opponent’s final tally by more than 7 million votes. Oma Seddiq, *Biden becomes the first presidential candidate in US history to win 80 million votes—and counting*, BUS. INSIDER (Nov. 26, 2020, 3:31 PM), <https://www.businessinsider.in/politics/world/news/biden-becomes-the-first-presidential-candidate-in-us-history-to-win-80-million-votes-and-counting/articleshow/79418492.cms>. With 270 Electoral College votes the threshold to win, Joe Biden won 306 Electoral College votes compared to Donald Trump’s 232 Electoral College votes. *The Latest: Biden says election workers showed courage*, ASSOCIATED PRESS (Dec. 14, 2020, 7:55 PM), <https://apnews.com/article/joe-biden-donald-trump-politics-gretchen-whitmer-michigan-ffd40e9fb35a9a77bddec2029193e14>.

40. Laurence H. Tribe & Joseph R. Grodin, Opinion, *Let’s hear it for the judges for dismissing Trump’s lawsuits*, BOS. GLOBE (Nov. 23, 2020, 2:29 PM), <https://www.bostonglobe.com/2020/11/23/opinion/lets-hear-it-judges-dismissing-trumps-lawsuits/>.

41. In its December 11, 2020 unsigned order in *Texas v. Pennsylvania*, the U.S. Supreme Court wrote: “The State of Texas’s motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially

Michigan, Pennsylvania and Wisconsin,<sup>42</sup> Republican Senator Ben Sasse, of Nebraska, weighed in, invoking the Rule of Law concept. “Since Election Night,” he said in a statement, rebuffing conspiracy theories spun out by Donald Trump and his campaign:

[A] lot of people have been confusing voters by spinning Kenyan Birther-type, ‘Chavez rigged the election from the grave’ conspiracy theories, but every American who cares about the rule of law should take comfort that the Supreme Court—including all three of President Trump’s picks—closed the book on the nonsense.<sup>43</sup>

Just three days later, after the Democratic Biden-Harris ticket’s victory was confirmed by the Electoral College on December 14th, then-President Elect Joe Biden offered these words to the nation after the country’s hotly contested election: “Once again in America, the rule of law, our Constitution, and the will of the people have prevailed. Our democracy—pushed, tested, threatened—proved to be resilient, true, and strong.”<sup>44</sup> Despite Donald Trump’s unrelenting efforts to deceive the country, including his own donors and supporters,<sup>45</sup> America’s

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cognizable interest in the manner in which another State conducts its elections. All other pending motions are dismissed as moot.” *Texas v. Pennsylvania*, No. 155 ORIG., 2020 WL 7296814 (U.S. Dec. 11, 2020).

42. Lawrence Hurley, *U.S. Supreme Court swiftly ends Trump-backed Texas bid to upend election results*, REUTERS (Dec. 11, 2020, 3:40 PM), <https://www.reuters.com/article/us-usa-election-trump/u-s-supreme-court-swiftly-ends-trump-backed-texas-bid-to-upend-election-results-idUSKBN28L2YY>.

43. @SenSasse, TWITTER (Dec. 11, 2020, 4:04 PM), <https://twitter.com/SenSasse/status/1337548874207154177>; Azmi Haroun, *After dud Texas lawsuit, Republican Sen. Ben Sasse says that the Supreme Court ‘closed the book on the nonsense.’*, BUS. INSIDER (Dec. 11, 2020, 9:02 PM), <https://www.businessinsider.com/ben-sasse-supreme-court-closed-book-texas-lawsuit-nonsense-2020-12> (providing a link to Sen. Ben Sasse’s “Statement on Supreme Court’s Election Decision” posted on Twitter on December 11, 2020); see also Nicole Sganga, *Trump floated appointing Sidney Powell, lawyer who promoted conspiracy theories, as special counsel on voter fraud*, CBS NEWS (Dec. 20, 2020, 8:19 AM), <https://www.cbsnews.com/news/trump-considered-sidney-powell-special-counsel-election-fraud-conspiracy-theories/> (“Powell promoted a number of baseless conspiracy theories about the election, including that the deceased Hugo Chávez, among others, had rigged the election against Mr. Trump by programming voting machines to switch votes for the president to President-elect Joe Biden.”).

44. Mark Sherman, *Electoral College makes it official: Biden won, Trump lost*, ASSOCIATED PRESS (Dec. 14, 2020), <https://apnews.com/article/joe-biden-270-electoral-college-vote-d429ef97af2bf574d16463384dc7cc1e>; Meg Wagner et al., *Electoral College vote affirms Biden’s win*, CNN (Dec. 15, 2020, 7:21 AM), [https://www.cnn.com/politics/live-news/electoral-college-vote-2020-biden-trump/h\\_0dab5100056e431a830417812175106f](https://www.cnn.com/politics/live-news/electoral-college-vote-2020-biden-trump/h_0dab5100056e431a830417812175106f).

45. Shane Goldmacher, *How Trump Steered Supporters Into Unwitting Donations*, N.Y. TIMES (Apr. 14, 2021), <https://www.nytimes.com/2021/04/03/us/politics/trump-donations.html>; Yelena Dzhanova, *The Trump campaign reportedly cheated donors who thought they were making a one-time contribution, collecting recurring donations*, BUS. INSIDER (Apr. 3, 2021, 1:05 PM), <https://www.businessinsider.com/trump-campaign-reportedly-duped-supporters-donors-recurring-donations-2021-4>.

representative democracy carried the day.<sup>46</sup> Most dramatically, lawmakers returned to the task at hand on the evening of January 6, 2021 following the rioting at the U.S. Capitol by the Proud Boys, the Oath Keepers, and other pro-Trump forces,<sup>47</sup> what Republican Senator Mitt Romney of Utah called an “insurrection, incited by the President of the United States.”<sup>48</sup> It was not until January 7th at 3:41 AM EST that Vice President Pence formally declared Joseph R. Biden the winner of the 2020 presidential election.<sup>49</sup>

This essay, which describes the vital importance of the Rule of Law to representative democracies, domestic and international law, and the protection of human rights,<sup>50</sup> is divided into nine parts. Part II lays out the meaning and critical components of the Rule of Law, while Part III recounts that concept’s foundation and history dating back to the ancient world. Part IV describes the American Revolution’s historic contributions to the Rule of Law’s development, with Part V highlighting changes in the understanding of the Rule of Law from the Enlightenment to modern times. Part VI focuses on the Rule of Law’s

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46. Dan Mangan, Jacob Pramuk & Kevin Breuninger, *Congress confirms Biden election as president, morning after Trump-fueled mob invades Capitol*, CNBC (Jan. 7, 2021, 8:05 AM), <https://www.cnn.com/2021/01/06/electoral-vote-update-congress-resumes-counting-after-pro-trump-rioters-invade-capitol.html>.

47. Associated Press, *Four men linked to Proud Boys charged in plot to attack Capitol*, NBC NEWS (Mar. 20, 2021, 9:21 AM), <https://www.nbcnews.com/news/us-news/four-men-linked-proud-boys-charged-plot-attack-capitol-n1261664>; Clare Hymes & Cassidy McDonald, *10 Oath Keepers indicted in Capitol conspiracy case, government says more could be added*, CBS NEWS (Mar. 16, 2021, 3:35 PM), <https://www.cbsnews.com/news/oath-keepers-indicted-conspiracy-capitol-riots-kenneth-harrelson/>; Josh Gerstein, *‘QAnon shaman,’ charged in Capitol riot, changes jails due to food*, POLITICO (Feb. 4, 2021, 11:41 PM), <https://www.politico.com/news/2021/02/04/qanon-shaman-jail-capitol-riot-466098>.

48. Press Release, Mitt Romney U.S. Senator for Utah, *Romney Condemns Insurrection at U.S. Capitol* (Jan. 6, 2021), <https://www.romney.senate.gov/romney-condemns-insurrection-us-capitol>.

49. Ledyard King et al., *Pence affirms Biden as winner, formalizing electoral count after day of riots at Capitol; Trump prepares for exit*, YAHOO! (Jan. 13, 2021, 6:58 AM), <https://www.yahoo.com/amphtml/now/congress-live-updates-lawmakers-count-120647333.html>; Jay Cannon, *Watch VP Pence confirm 2020 election win for Joe Biden hours after mob breaches Capitol*, USA TODAY (Jan. 7, 2021, 11:14 AM), <https://www.usatoday.com/story/news/politics/2021/01/07/watch-pence-certify-biden-harris-election-results-after-capitol-riot/6578507002/>.

50. Monica Hakimi, *Why Should We Care About International Law?*, 118 MICH. L. REV. 1283, 1289 (2020) (reviewing HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* (2018)) (“The rule of law generally refers not to what law is in a jurisprudential sense but to what makes law, as a political project, worthwhile. Why and under what conditions should we aspire to live in a society governed by law? Although accounts of the rule of law differ, the one that is most prominent in international legal circles prioritizes obedience to law, as a way of ensuring that states do not exercise power arbitrarily or unpredictably. In this account, the rule of law requires (1) relatively precise and transparent conduct rules, (2) that are consistently and impartially applied, (3) to constrain the discretion of the people who are in positions to govern.”).

transformative nature in the post–World War II period in which the newly created United Nations adopted the Universal Declaration of Human Rights;<sup>51</sup> Part VII contrasts instances of tyrannical rule and grotesque abuses of power with adherence to democratic norms and the Rule of Law ideal; Part VIII underscores the importance of the Rule of Law to safeguarding civil liberties and human rights; and Part IX describes what should be considered the penultimate Rule of Law violation—the use of state-sanctioned executions—to further illustrate the Trump Administration’s contempt for the Rule of Law<sup>52</sup> and human rights and to show how, in the U.S., the concepts of the Rule of Law and torture are still under-conceptualized in American life.<sup>53</sup> With Part X recalling the Rule of Law’s distant and immediate past and its future prospects in the wake of the Trump Administration, the essay concludes that restoring and strengthening the Rule of Law will be critical to safeguarding America’s representative democracy, to fostering democratic norms around the globe, and to protecting civil and international human rights.

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51. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

52. Christina Carrega, *Dozens of members of Congress call on Biden to end the federal death penalty*, CNN (Dec. 15, 2020, 5:07 PM), <https://www.cnn.com/2020/12/15/politics/death-penalty-congress-letter-pressley/index.html> (noting that, in December 2020, Massachusetts Rep. Ayanna Pressley wrote that the Trump Administration “has weaponized capital punishment with callous disregard for human life” and that “[i]n the middle of our current public health crisis, the Department of Justice resumed federal executions and executed more people in six months than the total number executed over the previous six decades”); Erik Ortiz, *Senators ask Justice Department watchdog to investigate federal executions under Trump*, NBC NEWS (Dec. 22, 2020, 8:52 AM), <https://www.nbcnews.com/politics/justice-department/senators-ask-justice-department-watchdog-investigate-federal-executions-under-trump-n1252079> (“Since July, the Justice Department under Attorney General William Barr has put 10 federal inmates to death, with three more executions scheduled in January just days before President-elect Joe Biden’s inauguration. That is the most executions in a presidential lame-duck period in more than 130 years.”).

53. In particular, I argue that the Rule of Law requires respect for universal human rights, such as the right to be free from torture, and that the death penalty (which bears all the indicia of a torturous practice) should be—but for whatever reason, has not yet been—classified and prohibited by law as a torturous act. *E.g.*, Matt Hadro, *Is the death penalty a form of psychological torture? This author says yes*, CATH. NEWS AGENCY (Mar. 14, 2017, 3:20 AM), <https://www.catholicnewsagency.com/news/is-the-death-penalty-a-form-of-psychological-torture-this-author-says-yes-26120> (discussing the arguments made in *THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION*, a book published in 2017 by Carolina Academic Press in which I argue that the death penalty should be classified under the rubric of torture).

## II. THE “RULE OF LAW” CONCEPT

There are “rules of law” and then there is the “Rule of Law.”<sup>54</sup> Both are important, but the Rule of Law—the application of which makes clear that no one, not even a nation’s leader, is above the law<sup>55</sup>—sets the character and tone for the proper administration of a country’s laws or, in the global context, for the application of international law.<sup>56</sup> If a tyrant, a despot, or an authoritarian leader or regime can ignore a provision of a legally binding treaty or a country’s constitution or snub or flout some other rule of law, then there is, in reality, no meaningful

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54. Jeremy Waldron, *The Rule of Law*, STAN. ENCYCLOPEDIA OF PHIL. (June 22, 2016), <https://plato.stanford.edu/entries/rule-of-law/> (“The phrase ‘the Rule of Law’ has to be distinguished from the phrase ‘a rule of law.’ The latter phrase is used to designate some particular legal rule like the rule against perpetuities or the rule that says we have to file our taxes by a certain date. Those are rules of law, but *the* Rule of Law is one of the ideals of our political morality and it refers to the ascendancy of law as such and of the institutions of the legal system in a system of governance.”); *id.* (“The most important demand of the Rule of Law is that people in positions of authority should exercise their power within a constraining framework of well-established public norms rather than in an arbitrary, *ad hoc*, or purely discretionary manner on the basis of their own preferences or ideology. It insists that the government should operate within a framework of law in everything it does, and that it should be accountable through law when there is a suggestion of unauthorized action by those in power.”).

55. This idea has been expressed in different ways through history. “[I]f you maltreat a penguin in the London zoo,” Law Lord Tom Bingham wrote in 2010, “you do not escape prosecution because you are the Archbishop of Canterbury.” GEERT CORSTENS, *UNDERSTANDING THE RULE OF LAW* 10 (Annette Mills trans., 2017); TOM BINGHAM, *THE RULE OF LAW* 4 (Penguin Books 2011) (2010); *see generally* TOM BINGHAM, *THE BUSINESS OF JUDGING: SELECTED ESSAYS AND SPEECHES* (2000). In 1903, in his Third Annual Message to Congress, President Theodore Roosevelt put it this way: “No man is above the law and no man is below it; nor do we ask any man’s permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor.” Theodore Roosevelt, *Third Annual Message to Congress*, 7 Dec. 1903, in *THE YALE BOOK OF QUOTATIONS* 648 (Fred. R. Shapiro, ed., 2006).

56. GERANNE LAUTENBACH, *THE CONCEPT OF THE RULE OF LAW AND THE EUROPEAN COURT OF HUMAN RIGHTS* 3 (2014) (“There are two different views of the rule of law in international law: one that sets standards for the international legal system, and one that sets standards for the national legal system.”). *Cf. id.* at 4 (“On the international level, there is no centralized hierarchical power that can ensure the application of the law. In the context of international law, the rule of law is mainly concerned with the conditions under which the power of states is exercised. At the same time, the possibilities that exist within international law to ensure compliance with the law are mainly dependent upon states. Furthermore, one of the central concepts of the rule of law is the equal application of the law. As noted, the control of state power through law is essential to any rule of law concept. However, states are not equal in power and strength, and this creates serious problems for the functioning of the rule of law in the international legal system.”).



Rule of Law, however that concept<sup>57</sup> is defined or understood,<sup>58</sup> whether by the U.N. Secretary-General,<sup>59</sup> a national leader,<sup>60</sup> a legal commentator,<sup>61</sup> or a historical figure.<sup>62</sup>

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57. Clemens A. Feinäugle, *The Rule of Law and Its Application to the United Nations*, in HANDBOOK ON THE RULE OF LAW 213 (Christopher May & Adam Winchester, eds., 2018) (“Lord Bingham counted among his eight sub-rules or principles of the rule of law, among others, that the law must be clear and predictable and be applied equally to all; that the law must afford adequate protection of human rights; that means must be provided for resolving disputes and that adjudicative procedures provided by the state should be fair.”); *see also* Christopher May & Adam Winchester, *Introduction* to HANDBOOK ON THE RULE OF LAW 1, 8-9 (Christopher May & Adam Winchester, eds., 2018) (laying out the eight components of the rule of law set forth by Tom Bingham as follows: (1) “The law must be accessible and so far as possible intelligible, clear and predictable.”; (2) “Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.”; (3) “The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.”; (4) “Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the power were conferred, without exceeding the limits of such powers and not unreasonably.”; (5) “The law must afford adequate attention to fundamental human rights.”; (6) “Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.”; (7) “Adjudicative procedures provided by the state should be fair.”; and (8) “The rule of law requires compliance by the state with its obligations in international law as in national law.”).

58. *See, e.g.*, John M. Breen, *The Lost Volume Seller and Lost Profits Under U.C.C. § 2-708(2): A Conceptual and Linguistic Critique*, 50 U. MIAMI L. REV. 779, 853 (1996) (“Although there is no one settled definition of ‘the rule of law,’ the basic concept is that disputes between individuals and the state must be resolved by the ‘law.’”); *see also* TOM BINGHAM, *THE RULE OF LAW* ch. 1 (Penguin Books 2011) (discussing different conceptions of the Rule of Law); LAUTENBACH, *supra* note 56, at 8 (“the rule of law is defined in very diverse ways.”). *Cf.* LAUTENBACH, *supra* note 56, at 18 (“Simple definitions of the rule of law describe the concept as ‘government by law, not by men’, or ‘the subjection of all state power to the law’, or ‘the limitation of arbitrary government.’”).

59. In a 2004 report, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,” the *rule of law* was defined as follows:

[A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

DANIELLE BESWICK & PAUL JACKSON, *CONFLICT, SECURITY AND DEVELOPMENT: AN INTRODUCTION* 172 (2d ed., 2015); U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Security Council, Doc. S/2004/616 (Aug. 23, 2004).

60. Dwight D. Eisenhower—a five-star General of the U.S. Army during World War II who became the 34th President of the United States—once put it this way: “The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law.” SCOTT SLORACH ET AL., *LEGAL SYSTEMS AND SKILLS* 23 (Oxford Univ. Press, 3d ed. 2017); *see also* KAIUS TUORI, *EMPIRE OF LAW: NAZI GERMANY, EXILE SCHOLARS AND THE BATTLE FOR THE FUTURE OF EUROPE* 121 (2020) (“The rule of law was

*Rules of law* are found in treaties,<sup>63</sup> constitutions,<sup>64</sup> statutes,<sup>65</sup> ordinances,<sup>66</sup> and administrative regulations.<sup>67</sup> Courts, through judicial

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one of the cornerstones of constitutional order and one of the first foundations that the Nazi regime would destroy.”).

61. David Kinley, *The universalizing of human rights and economic globalization: what roles for the rule of law?*, in GLOBALISATION AND THE RULE OF LAW 100 (Spencer Zifcak, ed. 2005) (noting that Lon Fuller “captured the essence of the notion” of the Rule of Law “in a classically pithy statement coming out of his own substantial work on the subject, that ‘law is the enterprise of subjecting human conduct to the governance of rules’ ”).

62. Machiko Kanetake, *The Interfaces Between the National and International Rule of Law: A Framework Paper*, in THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS: CONTESTATIONS AND DEFERENCE 15 n.18 (Machiko Kanetake & André Nollkaemper, eds., 2016) (“The modern elements of the rule of law were first formulated by AV Dicey. Three meanings of the rule of law developed by Dicey are: (1) the rule of regular law, and not by arbitrary power; (2) equality before the law; and (3) the protection of individual rights by judicial decisions.”) (citing ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 110-22 (1982)); THE SAGE ENCYCLOPEDIA OF POLITICAL BEHAVIOR 721-22 (Fathali M. Moghaddam, ed. 2017) (“Andrew Venn Dicey’s *Introduction to the Law of the Constitution* (1885) framed the modern Western jurisprudential debate over the nature of the rule of law. Dicey described the rule of law in expressly British terms and argued that in the United Kingdom, the rule of law comprised three related concepts. First, Dicey observed that the rule of law means a predominance of law and legal institutions as the means of governance, rather than arbitrary exercise of personal power. . . . Second, the rule of law according to Dicey meant that all individuals are entitled to be treated equally under the law. . . . Third, Dicey observed that constitutional rights in England were said to arise from the ordinary private law as applied and recognized by the courts. Constitutional rights emerged from the common law and the unwritten constitution of England rather than from an act of the state.”); see also Danilo Zolo, *The Rule of Law: A Critical Reappraisal*, in THE RULE OF LAW: HISTORY, THEORY AND CRITICISM 3 (Pietro Costa & Danilo Zolo eds., 2007) (“The ‘rule of law’ is deeply rooted in Great Britain’s political and constitutional history, from the Norman conquest to modern times, and has left significant traces upon the constitutional structures of the United States of America and of many other countries influenced by British institutions.”).

63. 1 HERSCH LAUTERPACHT, INTERNATIONAL LAW 58 (Elihu Lauterpacht ed., 1970) (“Treaties are agreements between States analogous in nature to contracts between private individuals. Like contracts, they fulfil a large variety of purposes. They lay down the rules of law to be followed by the parties as a matter of legal obligation.”).

64. CHARLES W. BACON & FRANKLYN S. MORSE, THE REASONABLENESS OF THE LAW 322 (1924) (“Constitutions are laws for the government of legislatures and courts. A State constitution confers upon a legislature the power to make State laws not inconsistent with the Constitution of the United States and with the constitution of the State. The Constitution of the United States gives to the Congress power to make national laws not inconsistent with that constitution.”).

65. KLINTON W. ALEXANDER & KERN ALEXANDER, HIGHER EDUCATION LAW: POLICY AND PERSPECTIVES 3 (2d ed. 2016) (“A statute is an act of the legislative branch of government expressing its will and constituting a law of the state. It is subordinate to a constitution. The term ‘statute’ is derived from the Latin phrase *statutum est*, which means ‘it is decided.’ ”).

66. ROGER LEROY MILLER & GAYLORD A. JENTZ, BUSINESS LAW TODAY COMPREHENSIVE: TEXT AND CASES 6 (9th ed. 2011) (noting that ordinances are “passed by municipal or county governing units to govern matters not covered by federal or state law”).

67. DAVID W. NEUBAUER & HENRY F. FRADELIA, AMERICA’S COURTS AND THE CRIMINAL JUSTICE SYSTEM 21 (13th ed. 2019) (“All levels of government—federal, state,

rulings, also lay down legal rules<sup>68</sup> by looking to precedents and custom—a foundation of both international law<sup>69</sup> and the common law.<sup>70</sup> In 1914, *Bouvier's Law Dictionary* defined a *rule of law* in this way: “A general principle of law, recognized as such by authorities. It is called a rule because in new cases it is a rule for their decision; it embraces particular cases within general principles.”<sup>71</sup> The *Rule of Law*,<sup>72</sup> by contrast, is defined by the *Oxford English Dictionary* as “[t]he authority and influence of law in society, esp. as when viewed as a constraint on individual and institutional behavior; (hence) the principle whereby all

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and local—authorize administrative agencies to issue specific rules and regulations consistent with the general principles specified in a statute or municipal ordinance.”).

68. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

69. HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* 60 (2d ed. 2019) (“In human societies generally, custom ranking as something amounting to law can be traced back to preliterate societies, where indeed it was virtually the only form of law possible.”); *id.* (“In treating custom as a source of legal rules, international law thus does not deviate from the pattern discernible in municipal legal systems.”); EMMERICH DE Vattel, *THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* ixv (Joseph Chitty ed., T. & J. W. Johnson, 7th Am. ed. 1849) (“Certain maxims and customs, consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law, form the *Customary law of Nations*, or the *Custom of Nations*.”); ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, *THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION* 6 (2017) (“By the eighteenth century, certain English judges and treatise writers endorsed the idea that the common law of England generally incorporated the law of nations. In 1764, Lord Mansfield observed ‘[t]hat the law of nations, in its full extent, was part of the law of England.’ Blackstone also described the law of nations as part of the law of the land.”). Article 38(1) of the Statute of the International Court of Justice (“ICJ Statute”) lists the following sources of international law: “international conventions,” “international custom,” “the general principles of law recognized by civilized nations,” “judicial decisions,” and “the teachings of the most highly qualified publicists of the various nations.” STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(1) (2017-2021).

70. *Wilcox v. Wood*, 9 Wend. 346, 349 (1832) (“A universal custom becomes common law.”); 1 STEWART RAPALJE & ROBERT L. LAWRENCE, *A DICTIONARY OF AMERICAN AND ENGLISH LAW, WITH DEFINITIONS OF THE TECHNICAL TERMS OF THE CANON AND CIVIL LAWS* 243 (1888) (noting that “the original common law” constituted “those rules which have been administered by the common law courts from time immemorial” and that “in this sense ‘common law’ is opposed to ‘statute law’”); HENRY JAMES HOLTHOUSE & HENRY PENINGTON, *A NEW LAW DICTIONARY, CONTAINING EXPLANATIONS OF SUCH TECHNICAL TERMS AND PHRASES AS OCCUR IN THE WORKS OF LEGAL AUTHORS, IN THE PRACTICE OF THE COURTS, AND IN THE PARLIAMENTARY PROCEEDINGS OF THE HOUSES OF LORDS AND COMMONS* 113 (1847) (“The custom of the realm . . . from the circumstance of its being the common or ordinary law of the land, as formerly administered between man and man, is denominated the *common law* of the realm, and under which denomination is comprised all the law of this country excepting the statute law.”).

71. JOHN BOUVIER, *BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA* 2975 (Francis Rawle ed., 3d rev. ed., 8th ed. 1914).

72. The term *Rule of Law* is frequently capitalized to distinguish it from a particular legal rule, or rule of law. *E.g.*, Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 3 n.1 (2008).

members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes.”<sup>73</sup> The Latin maxim *nemo est supra leges*—no one is above the laws<sup>74</sup>—has been around for a long time,<sup>75</sup> with the Rule of Law itself said to be “founded on the notion that no one is above the law.”<sup>76</sup>

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73. Carl Wellman, *Conceptual Analysis and Emergency Legislation*, in *THE RULE OF CRISIS: TERRORISM, EMERGENCY LEGISLATION AND THE RULE OF LAW* 17 (Pierre Auriel, Oliver Beaud & Carl Wellman eds. 2018); see also Hans Corell, *Reflections on International Criminal Justice: Past, Present and Future*, 12 WASH. U. GLOBAL STUD. L. REV. 621, 627 (2013) (“[W]hat does the rule of law mean? If we take the national level as a point of departure, one of the fundamental elements of the rule of law is that all should be equal under the law. In particular, the government and its officials and agents must be subject to and held accountable under the law.”); Monica P. Moyo, *The International Rule of Law: An Analysis*, 23 MINN. J. INT’L L. 79, 82 (2014) (“A number of normative principles have been used to define the thick or substantive understanding of the rule of law, including fairness in adjudication, clarity of law, limitation of discretion, ability to resolve civil disputes appropriately, and equal application of law. Other elements of a thick understanding of the rule of law include respect for international law as well as moral values such as the preservation of the ‘dignity, equality, and human rights of all persons.’”); Justin Hughes, *The Charming Betsy Canon, American Legal Doctrine, and the Global Rule of Law*, 53 VAND. J. TRANSNAT’L L. 1147, 1171 n.113 (2020) (“The federal judiciary’s own website describes ‘[r]ule of law [as] a principle under which all persons, institutions, and entities are accountable to laws that are: [p]ublicly promulgated; [e]qually enforced; [i]ndependently adjudicated; [a]nd consistent with international human rights principles.’”) (citation omitted).

74. AARON X. FELLMETH & MAURICE HORWITZ, *GUIDE TO LATIN IN INTERNATIONAL LAW* 194 (2009).

75. See, e.g., PETER HALKERSTON, *A COLLECTION OF LATIN MAXIMS AND RULES, IN LAW AND EQUITY, SELECTED FROM THE MOST EMINENT AUTHORS, ON THE CIVIL, CANON, FEUDAL, ENGLISH AND SCOTS LAW, WITH AN ENGLISH TRANSLATION* 95 (1823); WALTER A. SHUMAKER & GEORGE FOSTER LONGSDORF, *THE CYCLOPEDIA OF LAW: COMPRISING THE TERMS AND PHRASES OF AMERICAN JURISPRUDENCE, INCLUDING ANCIENT AND MODERN COMMON LAW, INTERNATIONAL LAW, AND NUMEROUS SELECT TITLES FROM THE CIVIL LAW, THE FRENCH AND THE SPANISH LAW, ETC., WITH AN EXHAUSTIVE COLLECTION OF LEGAL MAXIMS* 621 (1901); FELLMETH & HORWITZ, *supra* note 74, at 194; see also 1 *A COLLECTION OF STATE TRACTS, PUBLISH’D ON OCCASION OF THE LATE REVOLUTION IN 1688 AND DURING THE REIGN OF KING WILLIAM III*, at 264 (1705) (“[T]he King did not think himself above the Law . . . ”); “Wednesday’s Post,” *IPSWICH JOURNAL* (Ipswich, England), Nov. 24, 1792, at 4 (commenting on Louis XVI and the Constitution of 1791, noting that the French Declaration of Rights contains the “sacred maxim” that “[n]o one can be punished but in virtue of a law made prior to his crime” and that “[t]his maxim admits of no exception,” and observing: “A Constitution which might place a man above the law, even if accepted, would be null.”). The expression *nemo est supra leges* is listed in “Maxims and Rules of the Law of England, and Principles of Equity.” CAPEL LOFFT, *REPORTS OF CASES ADJUDGED IN THE COURT OF KING’S BENCH, FROM EASTER TERM 12 GEO. 3. TO MICHAELMAS 14 GEO. 3, WITH SOME SELECT CASES IN THE COURT OF CHANCERY, AND OF THE COMMON PLEAS, WHICH ARE WITHIN THE SAME PERIOD, TO WHICH IS ADDED THE CASE OF GENERAL WARRANTS, AND A COLLECTION OF MAXIMS* 1, 5 (1790) (listing the maxim in the separated paginated section of the book titled “Maxims and Rules of the Law of England, and Principles of Equity”).

76. Terry F. Buss & Adam Gardner, *Why Foreign Aid to Haiti Failed—and How to Do It Better Next Time*, in *FOREIGN AID AND FOREIGN POLICY: LESSONS FOR THE NEXT HALF-CENTURY* 208 (Louis A. Picard, Robert Groelsema & Terry F. Buss, eds., 2015). In the early twentieth century, at a speech in Butte, Montana, President Theodore Roosevelt put it this

The *Rule of Law* has multiple pillars,<sup>77</sup> but there is no consensus as to its exact definition even though the concept is a long-standing one.<sup>78</sup> “[A]lthough the precise meaning of the phrase ‘rule of law’ is much debated,” scholars Maurice Adams, Ernst Hirsch Ballin and Anne

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way: “Ours is a government of liberty by, through and under the law. No man is above it and no man is below it.” THEODORE ROOSEVELT, *A SQUARE DEAL FOR EVERY MAN: A COLLATION OF QUOTATIONS FROM THE ADDRESSES AND MESSAGES OF THEODORE ROOSEVELT, BEING A SELF-DELINEATION OF HIS CHARACTER AND IDEALS* (Robert J. Thompson comp., 1904). *Compare* Aspen Expl. Corp. v. Sheffield, 739 P.2d 150, 157 n.14 (Alaska 1987) (“The immunity of public officials is a relatively recent phenomenon. Traditionally, the common law did not distinguish between public officials and private individuals for purpose of personal tort liability . . . This rule had its origin in the Anglo-American common law principle that ‘no man is above the law.’ As the eminent British constitutional scholar, A.V. Dicey boasted: ‘[w]ith us every official from the Prime Minister down to the constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.’”) (citations omitted), *with id.* at 157-58 (“[T]oday the general rule in the federal courts, and a minority of states, is that a public official is absolutely immune from common law tort liability for any discretionary act done within the scope of the official’s authority without regard to motive.”).

77. *See, e.g.*, CRISTINA NICOLESCU-WAGGONER, *NO RULE OF LAW, NO DEMOCRACY: CONFLICTS OF INTEREST, CORRUPTION, AND ELECTIONS AS DEMOCRATIC DEFICITS* 14 (SUNY Press 2016) (“I identify four main pillars of *rule of law* in a state: the separation of powers, the predictability of the legal system, the independence and impartiality of judiciary, and the equal protection of civil rights and liberties by the law. . . . [S]ince the justice system is the guardian of rule of law, I identify the *independence and impartiality of the judiciary and the predictability of the legal system* as the crucial weak links in the process of rule of law establishment. If these two components are harmed, they weaken all other rule of law pillars.”).

78. *Id.* at 28 (“The definition of *rule of law* is also complex. Much like defining democracy, defining rule of law is similar to going through a very extended checklist organized into five major categories: accountability, legislation, enforcement, fairness, and efficiency.”); *compare id.* (“I prefer the definition employed by the International Bar Association. Rule of law is principle of governance in which *all persons, institutions and entities, public and private, including the State itself are accountable to laws that are publicly promulgated, equally consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability of the law, fairness in the application of the law, separation of powers, participation in the decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*”) *with id.* (“I make available a list of the most frequently employed definitions of rule of law both by scholars and practitioners (appendix 1).”); *see also* Roisin Burke, *Somalia and Legal Pluralism: Advancing Gender Justice Through Rule of Law Programming in Times of Transition*, 16 LOY. U. CHI. INT’L L. REV. 177, 185-86 (2020) (“There is no universally accepted definition of the ‘rule of law’ (‘RoL’). The literature refers to both ‘thin’ and ‘thick’ conceptions of the rule of law. Thin definitions of the rule of law generally refer to formal legal and procedural rules, which often tend to be minimalist. Thick definitions of the rule of law go towards the broader contours of justice and human rights, including gender justice. Rule of law is a system wherein each and every individual has access to a just and equitable system, that is accountable, trustworthy, accessible, transparent, entails a culture of compliance with the law, and ensures human rights are complied with on an equal basis for all.”); Teemu Ruskola, *Law Without Law, or Is “Chinese Law” an Oxymoron?*, 11 WM. & MARY BILL RTS. J. 655, 657 (2003) (“[T]here is little consensus on just what constitutes ‘rule of law.’ Legal theorists have proposed multiple definitions ranging from ‘thick’ to ‘thin,’ from ‘instrumental’ to ‘substantive.’”).

Meuwese explain, “nowadays there seems to be some agreement that it encompasses fundamental rights protection, judicial review, the division of powers, as well as a variety of governance requirements—values that are in some form also legally protected by constitutional norms.”<sup>79</sup> “The ‘rule of law’ in its usual sense,” emphasizes University of Baltimore law professor Tim Sellers, “implies the fulfillment of justice and the negation of government by and for the benefit of those in charge.”<sup>80</sup>

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79. Maurice Adams et al., *The Ideal and the Real in the Realm of Constitutionalism and the Rule of Law: An Introduction*, in CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM 4 (Maurice Adams, Ann Meuwese & Ernst Hirsch Ballin eds., 2017); see also Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT’L L. 315, 316-17 (2011) (noting that “there is an immense literature” on what the Rule of Law requires and “the ideal is heavy contested”; suggesting that “[r]eaders unfamiliar with the main issues might want to look at writings on the subject by Aristotle, Dicey, Dworkin, Fallon, Finnis, Fuller, Hayek, Locke, Raz, Rawls, and Tamanaha”; and observing “the ROL comprises some or all of the following”: “1. a requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences or ideology; 2. a requirement that there be general rules laid down clearly in advance, rules whose public presence enables people to figure out what is required of them, what the legal consequences of their actions will be, and what they can rely on so far as official action is concerned; 3. a requirement that there be courts, which operate according to recognized standards of procedural due process or natural justice, offering an impartial forum in which disputes can be resolved, and allowing people an opportunity to present evidence and make arguments before impartial and independent adjudicators to challenge the legality of official action, particular[ly] when it impacts on vital interests in life, liberty, or economic well-being; 4. a principle of legal equality, which ensures that the law is the same for everyone, that everyone has access to the courts, and that no one is above the law.”).

80. Mortimer Sellers, *An Introduction to the Rule of Law in Comparative Perspective*, in THE RULE OF LAW IN COMPARATIVE PERSPECTIVE 2 (Mortimer Sellers & Tadeusz Tomaszewski eds., 2010); see also *id.* at 4 (“This, then, is the central definition and purpose of the rule of law: the effort to discover what combination of powers in society, or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that citizens may constantly enjoy the benefit of them, and be sure of their continuance.”). Mortimer “Tim” Sellers is an expert on republicanism and the Rule of Law, and he has emphasized the Rule of Law’s importance to promoting liberty and the common good. *E.g.*, M. N. S. SELLERS, AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION 7 (1994) (“Understanding American republicanism requires a familiarity with the literary and political sources used and imitated by eighteenth-century Americans. These included not only the Roman authors and statesmen Americans explicitly appropriated in their pamphlets and pseudonyms, but also European writers who had interpreted Rome in the past, and Americans who had incorporated Roman imagery into their public iconography and grammar-school curriculum.”); Mortimer Sellers, *What Is the Rule of Law and Why Is It So Important?*, in DEMOCRACY AND RULE OF LAW IN THE EUROPEAN UNION: ESSAYS IN HONOUR OF JAAP W. DE ZWAAN 5 (Flora A.N.J. Goudappel & Ernst M.H. Hirsch Ballin, eds., 2016) (“The rule of law signifies ‘the empire of laws and not of men’: the subordination of arbitrary power and the will of public officials as much as possible to the guidance of laws made and enforced to serve their proper purpose, which is the public good (*res publica*) of the community as a whole. When positive laws or their interpretation or enforcement serve other purposes, there is no rule of law, in its fullest sense, but rather ‘rule by law’—mere legalism—in service of arbitrary power. The vocabulary here is important, because the concept of the rule of law enjoyed its fullest elaboration in tandem

### III. THE ANCIENT ORIGINS OF THE RULE OF LAW, AND ITS IMPORTANCE THROUGH HISTORY

The idea of the Rule of Law<sup>81</sup> emerged in ancient times,<sup>82</sup> including in Athens<sup>83</sup> and Rome.<sup>84</sup> “In the Western tradition,” one encyclopedia

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with related struggles for ‘liberty’ and ‘republican government’ against tyranny and oppression.”); *id.* (“When we have and maintain a legal system that serves the common good of society as a whole, then we have the rule of law (because the laws rule and not men), we have liberty (because the law prevents oppression), and we live in a republic (because government advances the ‘*res publica*’ or ‘common good’ of its subjects). The rule of law, liberty, and republican government are three facets of the same substantive good, secured only where the laws rule and protect us from tyranny and oppression.”).

81. *See, e.g.*, CHRISTOPHER MAY, THE RULE OF LAW: THE COMMON SENSE OF GLOBAL POLITICS 33-45 (2014) (discussing the complexity of the Rule of Law concept and providing differing historical perspectives that have been offered as to its meaning); Yongshun Cai & Songcai Yang, *State Power and Unbalanced Legal Development in China, in* DEBATING POLITICAL REFORM IN CHINA: RULE OF LAW VS. DEMOCRATIZATION 164 (Suisheng Zhao ed., 2015) (“There has not been a commonly accepted definition of rule of law, but ‘[v]irtually all definitions of rule of law agree on the importance of law’s function to set limits to the exercise of private and state power.’ Hence, a precondition for rule of law is to restrain state actors.”).

82. BERNARD J. COUGHLIN, THE SOUL OF A NATION: CULTURE, MORALITY, LAW, EDUCATION, FAITH 77 (2012) (“The concept of the ‘rule of law,’ which rests on natural law theory, we . . . owe to Aristotle. In the *Politics* he asks whether the rule of an individual is preferable to the rule of law. He answers: ‘To invest the law then with authority is, it seems, to invest God and intelligence only; to invest a man is to introduce a beast, as desire is something bestial and even the best of men in authority are liable to be corrupted by anger. We may conclude then that the law is intelligence without passion and is therefore preferable to any individual’ . . . This philosophy of natural law and the rule of law the Romans inherited from the Greeks, and Western Civilization received it from the Romans.”).

83. EDWARD M. HARRIS, THE RULE OF LAW IN ACTION IN DEMOCRATIC ATHENS 3 (2013) (“The Rule of Law was one of the most important cultural values in Athenian democracy. When delivering the funeral oration for the Athenian soldiers who fell at Lamia in 322 BCE, Hyperides (*Epitaphios* 25) declared: ‘For men to be happy they must be ruled by the voice of law, not the threats of a man; free men must not be frightened by accusation, only by proof of guilt; and the safety of our citizens must not depend on men who flatter their masters and slander our citizens but on our confidence in the law.’”) (citation omitted); *see also id.* at 5 (“According to Dicey, the rule of law requires that ‘no one is above the law and everyone is equal before the law regardless of social, economic, or political status.’ This principle is contained in an article in the *Déclaration des droits de l’homme of 1789* (‘Les hommes naissent et demeurent libres et égaux en droits’). There can be no question that the Athenians believed in this principle and followed it in their laws. According to Demosthenes, the Athenians enjoyed equality because of their laws. This principle was explicitly stated in the laws enacted in 403 BCE: ‘It is not permitted to enact a law directed at an individual unless the same law applies to all Athenians.’”).

84. NORMAN E. BOWIE & ROBERT L. SIMON, THE INDIVIDUAL AND THE POLITICAL ORDER: AN INTRODUCTION TO SOCIAL AND POLITICAL PHILOSOPHY 54-55 (4th ed. 2008) (“The concern for the rule of law as manifested in ancient Rome led to further emphasis on the Stoic ideal of a law of nature. In 534 AD, Emperor Justinian presided over the completion of the *Corpus Iuris Civilis*, a great codebook of Roman law. This codification of the law of the Roman Empire was to have remarkable influence, for one of the great gifts of Rome to later civilizations was appreciation of the significance of the rule of law. Justinian’s law books claimed universal validity and so reinforced the Stoic ideal of a law over and above the law of any particular community, applying equally to all. This conception of a ‘higher’ law than

notes, “the historical origins of the rule of law go back more than 2,000 years.” “Many ancient legal systems, such as the Code of Hammurabi, the Twelve Tables in ancient Rome, and the Mosaic Law of ancient Israel,” it observes, “established legal codes to be applied . . . .”<sup>85</sup> But the concept of the Rule of Law, properly understood, consists of far more than just *having* written laws in place.<sup>86</sup> As that modern encyclopedia observes: “[W]hile the existence of laws is a necessary precondition for the rule of law to exist, it is not sufficient. The rule of law ideal requires the sovereign to accept law as a constraint on the sovereign’s interactions with members of the polity.”<sup>87</sup> “In the Western tradition,” that encyclopedia stresses of the Rule of Law’s beginnings so long ago, “the first serious treatments of the rule of law as a limitation on the ability of the state to act outside the law were Plato’s *The Republic* and Aristotle’s *Politics*.”<sup>88</sup>

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that of one’s community was acknowledged by many educated Romans during various stages of the Empire’s development. Perhaps none expressed the idea as well as Cicero, who declared: ‘There is indeed a law, right reason, which is in accordance with nature; existing in all, unchangeable, eternal . . . It is not one thing at Rome, and another thing at Athens . . . but it is a law, eternal and immutable for all nations and for all time.’”).

85. THE SAGE ENCYCLOPEDIA OF POLITICAL BEHAVIOR, *supra* note 62, at 721; *cf. id.* (“Despite the positive benefits claimed to be associated with the rule of law, attempts by Western agencies to export the rule of law to non-Western countries have met with limited success. China, in particular, and many Asian countries in general, have resisted both formal and substantive formulations of the rule of law as incompatible with non-Western social and legal norms. Chinese jurists, scholars, and political elites advocate a minimalist, nonsubstantive understanding of the rule of law in the form of ‘rule *by* law.’ Rule *by* law idealizes the use of law by the state to govern its citizens but does not imply any restraint on government *by* law.”).

86. *Id.* at 722 (noting that “[s]cholars such as Joseph Raz, Lon Fuller, and John Finnis have suggested a number of formal principles comprising the rule of law ideal,” including these: (1) publication of laws so there is notice of what the law requires; (2) integrity in creating and applying the law, which means “clear, transparent, and open rules and processes” and executive agencies and judges who “apply the law faithfully and refrain from arbitrary exercises of discretion, providing special benefits to certain individuals or classes not specified in law, or ignoring the law in exercising their powers”; (3) independence of the judiciary so judges are able to “apply the law free of outside political influences”; (4) laws that are understandable, that do not impose contradictory obligations on those subject to them, that are possible to comply with, and that are prospective in their application, with “[t]he rule of law ideal” being “inconsistent with the use of laws to retrospectively punish or prohibit past conduct that was not illegal or improper at the time it occurred”; (5) stability, because “[a] state that makes frequent, radical changes to the legal rights and obligations of its citizens undermines the ability of those subjects to rely upon law as the primary mechanism for communicating legal requirements”; and (6) “[g]enerality and neutrality,” with the ideal that laws are to be “general in application and not designed to benefit or suppress particular persons or classes of persons”).

87. *Id.* at 721.

88. *Id.*; *see also id.* (“[I]n Book II of the *Politics*, Aristotle distinguished states ruled by individuals (such as monarchy where a sovereign exercises arbitrary power over subjects) from politics ruled through laws applicable to all including the sovereign itself. Aristotle observed that all individuals, including rulers, are subject to self-interested appetites and



The Rule of Law's history, in fact, cannot be separated from ancient philosophers, the Enlightenment's intellectual history, or revolutionary constitutions, be they in Africa, Europe, North America or elsewhere.<sup>89</sup> The American and French Revolutions, for instance, both produced written declarations of rights that changed the course of world history, just as—two centuries later—South Africa would rid itself of apartheid and adopt a new, transformative constitution.<sup>90</sup> In America, the Declaration of Independence (1776), revolutionary state constitutions, the U.S. Constitution, and the U.S. Bill of Rights (1791) contain rights clauses that recite protections for civil rights and civil liberties.<sup>91</sup> Likewise, in France, the Declaration of the Rights of Man and the Citizen (1789), with its preamble referencing “the natural, unalienable and sacred rights of man,” states in its very first article: “Men are born and

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passions that corrupt their ability to exercise power and make decisions rationally in the interest of the overall populace. Aristotle therefore considered the rule of law to be a mechanism for controlling otherwise unrestrained passions by subjecting them to the dictates of natural law and reason.”); Waldron, *supra* note 79 (“The Rule of Law has been an important ideal in our political tradition for millennia, and it is impossible to grasp and evaluate modern understandings of it without fathoming that historical heritage. The heritage of argument about the Rule of Law begins with Aristotle (c. 350 BC); it proceeds with medieval theorists like Sir John Fortescue (1471), who sought to distinguish lawful from despotic forms of kingship; it goes on through the early modern period in the work of John Locke (1689), James Harrington (1656), and (oddly enough) Niccolò Machiavelli (1517); in the European Enlightenment in the writings of Montesquieu (1748) and others; in American constitutionalism in *The Federalist Papers* and (and even more forcefully) in the writings of the Federalists’ opponents; and, in the modern era, in Britain in the writings of A. V. Dicey (1885), F.A. Hayek (1944, 1960, and 1973), Michael Oakeshott (1983), Joseph Raz (1977), and John Finnis (1980), and in America in the writings of Lon Fuller (1964), Ronald Dworkin (1985), and John Rawls (1971).”).

89. A recent book traces the global history of written constitutions from the 1750s to the twentieth century. LINDA COLLEY, *THE GUN, THE SHIP, AND THE PEN: WARFARE, CONSTITUTIONS, AND THE MAKING OF THE MODERN WORLD* (2021).

90. Themba Shabangu, *The South African Police: From an Instrument of Terror to a Legitimate Modern Policing Agency*, in *ESSAYS ON THE EVOLUTION OF THE POST-APARTHEID STATE: LEGACIES, REFORMS AND PROSPECTS* 23 (Mcebisi Ndletyana & David Maimela eds., 2014) (noting that “the adoption of the Interim Constitution and the 1994 elections” in South Africa “transformed” the country “into a *rechtsstaat*, a state based on constitutional law” and that “[t]he Constitution of the Republic of South Africa became the supreme law of the land, and any law or state actions inconsistent with it, became illegal”).

91. *E.g.*, RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7 (1997) (“The clauses of the American Constitution that protect individuals and minorities from government are found mainly in the so-called Bill of Rights—the first several amendments to the document—and the further amendments added after the Civil War.”); RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 128 (1994) (“Read in the most natural way, the words of the Bill of Rights do seem to create a breathtakingly abstract, principled constitution. Taken at face value, they command nothing less than that government treat everyone subject to its dominion with equal concern and respect, and that it not infringe their most basic freedoms, those liberties essential, as one prominent jurist put it, to the very idea of ‘ordered liberty.’”).

remain free and equal in rights.”<sup>92</sup> By contrast, South Africa’s post-apartheid constitution—adopted in the 1990s<sup>93</sup>—protects not only an array of individual civil rights, but also social and economic rights such as education, food and water, health care, housing, social security, and the environment.<sup>94</sup>

Throughout the world, adherence to the Rule of Law only emerged over time, with fierce battles between monarchical rule and the desire

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92. U.S. CONGRESS, SENATE, THE FRENCH DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN AND THE AMERICAN BILL OF RIGHTS: A BICENTENNIAL COMMEMORATION 1789-1989, at 1 (1989) (providing a Bicentennial Commemoration issued pursuant to S.J. Res. 317, 100th Congress containing a translation of the Declaration of the Rights of Man and of the Citizen adopted by the National Assembly during the French Revolution on August 26, 1789). The articles of the French Declaration make multiple declarations about rights and law itself. Article 2 states: “The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are Liberty, Property, Safety, and Resistance to Oppression.” *Id.* Article 4 proclaims:

Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law.

*Id.* And Article 5 declares: “The Law has the right to forbid only those actions that are injurious to society. Nothing that is not forbidden by Law may be hindered, and no one may be compelled to do what the law does not ordain.” *Id.* In addition, Article 6 states:

The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents.

*Id.*

93. John D. Bessler, *In the Spirit of Ubuntu: Enforcing the Rights of Orphans and Vulnerable Children Affected by HIV/AIDS in South Africa*, 31 HASTINGS INT’L & COMP. L. REV. 33, 47 (2008) (“The Constitution of the Republic of South Africa, adopted in 1996, is ‘the supreme law of the Republic.’ It proclaims that ‘South Africa belongs to all who live in it,’ and it was specifically promulgated to ‘[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.’ The Constitution’s very first section states that South Africa is founded upon the values of ‘[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms’ and the ‘[s]upremacy of the constitution and the rule of law.’ All of South Africa’s citizens are ‘equally entitled to the rights, privileges and benefits of citizenship’ and ‘equally subject to the duties and responsibilities of citizenship.’”).

94. Danie Brand, *Introduction to Socio-Economic Rights in the South African Constitution*, in SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA 1 (Danie Brand & Christof Heyns eds., 2005) (“The South African Constitution is known for its entrenchment of a range of socio-economic rights: environmental rights and rights to land, housing, health care, food, water, social assistance and education. These rights, together with various other features in the Constitution, indicate that the South African Constitution differs from a traditional liberal model in that it is *transformative*, as it does not simply place limits on the exercise of collective power (it does that also), but requires collective power to be used to advance ideals of freedom, equality, dignity and social justice.”); Bessler, *supra* note 93, at 48-49 (discussing various socio-economic rights set forth in South Africa’s Constitution).

for popular sovereignty and totalitarian or authoritarian regimes<sup>95</sup> and societies seeking liberty.<sup>96</sup> Famously, Charles I—the King of England, Scotland, and Ireland who reigned from 1625 until his death in 1649—was put on trial for treason and then beheaded on January 30, 1649 in front of the Banqueting House at Whitehall.<sup>97</sup> It was only after the Commonwealth of England, led by Oliver Cromwell, and for a short time, his son, Richard Cromwell,<sup>98</sup> that the monarchy was restored in 1660 under King Charles II, who ruled until his death in 1685.<sup>99</sup> And it was only after the reign of his successor, James II (a devout Catholic who inherited the throne from his elder brother), that the Glorious Revolution of 1688-1689 ushered in the Protestant rule of William and Mary, who, upon assuming power, agreed to abide by a declaration of rights protecting their subjects.<sup>100</sup> In the following century, the American and French Revolutions were, themselves, seminal historical

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95. The Tudor and Stuart monarchies were characterized by acts of immense cruelty, including many executions. *See generally* ST. GEORGE KIERAN HYLAND, A CENTURY OF PERSECUTION UNDER TUDOR AND STUART SOVEREIGNS FROM CONTEMPORARY RECORDS (1920); *see also* KRISTEN DEITER, THE TOWER OF LONDON IN ENGLISH RENAISSANCE DRAMA: ICON OF OPPOSITION 121 (Erica Wetter et al. eds., 2008) (“Tudor-Stuart executions were . . . theatrical, employing the scaffold as a stage of public spectacle that usually followed an established sequence of rituals designed to assert and strengthen the monarch’s power over subjects’ bodies and discourage criminal activity by spectators.”). The history of colonial powers exploiting indigenous peoples is likewise well documented in the scholarly literature. *See generally* ROBERT HARMS, LAND OF TEARS: THE EXPLORATION AND EXPLOITATION OF EQUATORIAL AFRICA (2019); WILLIAM G. MCLOUGHLIN, AFTER THE TRAIL OF TEARS: THE CHEROKEES’ STRUGGLE FOR SOVEREIGNTY 1839–1880 (2014); FRANCIS JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST (2010); *see also* Ewout Frankema & Frans Buelens, *Introduction to COLONIAL EXPLOITATION AND ECONOMIC DEVELOPMENT: THE BELGIAN CONGO AND THE NETHERLAND INDIES COMPARED 1* (Ewout Frankema & Frans Buelens eds., 2013) (“Ample historical literature has shown that particular practices of colonial exploitation have caused widespread impoverishment, not only because colonial powers prioritized their own economic, political, and military interests at the expense of the majority of subject peoples, but also because they bequeathed to their overseas possessions distorted institutions which have undermined political stability and the growth of prosperity in the post-colonial era.”).

96. *E.g.*, JON ORMAN, LANGUAGE POLICY AND NATION-BUILDING IN POST-APARTHEID SOUTH AFRICA 91 (2008) (noting that “[t]he post-apartheid era in South Africa began officially in 1994 when the first multiracial all-party elections were held,” leading to Nelson Mandela’s election).

97. WILCOMB E. WASHBURN, VIRGINIA UNDER CHARLES I AND CROMWELL, 1625-1660, at 42 (2009); AUSTIN WOOLRYCH, BRITAIN IN REVOLUTION: 1625-1660, at 433-34 (2002); PETER CUNNINGHAM, LONDON IN 1857, at 6 (1857).

98. *See generally* M. FRANCOIS GUIZOT, HISTORY OF OLIVER CROMWELL AND THE ENGLISH COMMONWEALTH, FROM THE EXECUTION OF CHARLES THE FIRST TO THE DEATH OF CROMWELL (Andrew R. Scoble trans., 1854).

99. *See generally* TIM HARRIS, RESTORATION: CHARLES II AND HIS KINGDOMS 1660–1685 (2006).

100. JACKSON J. SPIELVOGEL, WESTERN CIVILIZATION, SINCE 1300, at 477 (8th ed. 2012) (discussing the accession of James II (1685-1688), the Glorious Revolution, and how William and Mary were offered the throne subject to the provisions of a declaration of rights).

events in the Rule of Law's history. "After the English Revolution of 1688, the American Revolution of 1776, and the French Revolution of 1789," one historian, Alexander Rosenthal, has observed, "the great principles of popular sovereignty, rule of law, and constitutional government at long last were secure and established for posterity."<sup>101</sup>

The Rule of Law concept has been refined over time,<sup>102</sup> including for use in the international development arena,<sup>103</sup> with different cultures

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101. ALEXANDER S. ROSENTHAL, CROWN UNDER LAW: RICHARD HOOKER, JOHN LOCKE, AND THE ASCENT OF MODERN CONSTITUTIONALISM 245 (2008). The American and French Revolutions, another source notes,

introduced two different forms of rule of law: one which guarantees the supremacy of the constitution through the right to constitutional review by the judiciary (the US model), and one which only guarantees the supremacy of the legislator over the executive through legislative judicial review (the French, or by extension European continental model).

Randall Lesaffer & Shavana Musa, *The Emergence of the Rule of Law in Western Constitutional History: Revising Traditional Narratives*, in CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM 96 (Maurice Adams, Anne Meuwese & Ernst Hirsch Ballin eds., 2017). The French Revolution degenerated into the Reign of Terror and grotesque beheadings. See generally PAUL FRIEDLAND, SEEING JUSTICE DONE: THE AGE OF SPECTACULAR CAPITAL PUNISHMENT IN FRANCE (2012). But the French Revolution—like the American Revolution before it—sought to create a government of laws. Even French King Louis XVI, before he was guillotined in 1793, issued this proclamation in late 1791:

I have accepted the Constitution; I will use all my endeavours to maintain it, and cause it to be executed . . . And you, whom the people have chosen to watch over their interests; you, also, on whom they have conferred the formidable power of determining on the property, the honour, and the life of citizens; you, whom they have instituted to adjust their differences, members of the different administrative bodies, judges of tribunals, judges of peace, I recommend to you to be impressed with the importance and dignity of your functions; fulfill them with zeal, with courage, with impartiality;—labour with me to restore peace, and the government of laws; and by thus securing the happiness of the nation, prepare for the return of those whose absence has only proceeded from the fear of disorder and violence.

*An accurate translation of the Proclamation of Louis XVI, the Patriot 'King of the French', GEN. ADVERTISER*, Dec. 24, 1791, at 3.

102. THE SAGE ENCYCLOPEDIA OF POLITICAL BEHAVIOR, *supra* note 62, at 721 ("Cicero condemned sovereigns who refused to comply with the law and argued that public officials should themselves be subject to the law. The *Corpus Iuris Civilis* developed under the Roman Emperor Justinian and other legal works provided the foundation for much of medieval jurisprudence produced a millennium later."); 5 CHRISTOPH BLEIKER & MARC KRUPANSKI, THE RULE OF LAW AND SECURITY SECTOR REFORM: CONCEPTUALISING A COMPLEX RELATIONSHIP 21-22 (2012) (noting that Rule of Law discourse became "heavily policy driven" in the twentieth century and that "[w]ithin the framework of international peace and development work, it was not until the 1960s and early 1970s that a RoL-related framework and discourse gained significant and central traction in policy"; "By the end of the twentieth century the concept of RoL had become more defined in terms of the norms of 'democracy' and 'human rights'. Over time, the convergence of international democracy and human rights promotion under the umbrella of international development assistance led to an increasingly articulated set of explicit standards whose implementation in transitioning and developing countries was promoted in the form of substantive RoL programmes.").

103. G.A. Res. 67/1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (Nov. 30, 2012),

articulating it in different ways.<sup>104</sup> A more nuanced understanding of the Rule of Law<sup>105</sup> has thus emerged in the scholarly literature, even as the “Rule of Law” terminology has become widespread in popular culture<sup>106</sup>

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<https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf> (reciting in the preamble of this six-page declaration: “We, Heads of State and Government, and heads of delegation have gathered at United Nations Headquarters in New York on 24 September 2012 to reaffirm our commitment to the rule of law and its fundamental importance for political dialogue and cooperation among all States for the further development of the three main pillars upon which the United Nations is built: international peace and security, human rights and development. We agree that our collective response to the challenges and opportunities arising from the many complex political, social and economic transformations before us must be guided by the rule of law, as it is the foundation of friendly and equitable relations between States and the basis on which just and fair societies are built.”).

104. See, e.g., Laurent Pech, *Rule of Law in France*, in *ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S.* 80 (Randall Peerenboom ed., 2004) (“The first French peculiarity is the lack of any French expression, until the beginning of the twentieth century, with a meaning similar to the concept of rule of law. It was only then that the term *Etat de droit*—usually used today to loosely translate the term rule of law—became familiar among scholars. However, originally, the French term was only conceived as the literal translation of the German term *Rechtsstaat*, first introduced into French legal doctrine by Professor Léon Duguit in 1907.”); *id.* (“The close relation of the French term *Etat de droit* to the concept of *Rechtsstaat* requires a brief account of what German legal doctrine understands under this concept. Although it is customary to consider Immanuel Kant as the spiritual father of the concept of *Rechtsstaat*, the term itself was apparently first used in 1798 by Johan Wilhelm Placidus in his *Litteratur der Staatslehre. Ein Versuch*. This neologism was then popularized by Robert von Mohl, who defined the main objective of a *Rechtsstaat* as ‘organiz[ing] the living together of the people in such a manner that each member of it will be supported and fostered, to the highest degree possible, in the free and comprehensive exercise and use of his strengths.’”).

105. See Robert A. Stein, *The Rule of Law*, in *THE RULE OF LAW IN THE 21ST CENTURY: A WORLDWIDE PERSPECTIVE* 19 (Robert A. Stein & Richard J. Goldstone eds., 2015) (noting that “several principles that are central to the meaning of the rule of law have emerged,” and listing the following: (1) “The law must be superior. All persons are subject to the law whatever their station in life.”; (2) “There must be separation of powers in the government. The lawmakers should enact the law in general terms. It should not be the body that decides on application of the law to specific situations.”; (3) “The law must be known and predictable so that persons will know the consequences of their actions. The law must be sufficiently defined and government discretion sufficiently limited to ensure the law is applied in a non-arbitrary manner.”; (4) “The law must be applied equally to all persons in like circumstances.”; (5) “Members of society must have the right to participate in the creation and refinement of laws that regulate their behaviour.”; (6) “The law must be just and protect the fundamental human rights of all members of society.”; (7) “Legal processes must be sufficiently robust and accessible to ensure the enforcement of those protections.”; and (8) “The judicial power must be exercised independently of either the executive or legislative powers, and individual judges must base their decisions solely on the laws and the facts of individual cases.”); see also Richard J. Goldstone, *Independence of the Judiciary*, in *THE RULE OF LAW IN THE 21ST CENTURY: A WORLDWIDE PERSPECTIVE* (Robert A. Stein & Richard J. Goldstone eds., 2015) (“The equal treatment of all under the law is not possible without independent and unbiased judges to interpret and apply the law.”).

106. See Pietro Costa & Danilo Zolo, *Preface to THE RULE OF LAW: HISTORY, THEORY AND CRITICISM* ix (Pietro Costa & Danilo Zolo, eds. 2007) (“Today the expression ‘rule of law’ is remarkably widespread, not only in political and legal literature but, most notably, in newspapers and political language. This expression is by no means a fresh lexical creation:

and modern legal discourse.<sup>107</sup> “The concept of rule of law,” as two respected legal scholars, Tom Sullivan and Toni Massaro, explain in their book, *The Arc of Due Process in American Constitutional Law* (2013), “first appeared in ancient Greece,<sup>108</sup> and was embodied by the term ‘isonomia’ meaning ‘equality of laws to all manner of persons.’”<sup>109</sup> The definition of *Rule of Law* is still frequently debated,<sup>110</sup> as it no doubt will continue to be,<sup>111</sup> but Sullivan and Massaro observe that it has both procedural and substantive elements and “can usefully be reduced to the

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the formula ‘rule of law’ has in fact a long history, deeply affecting its meaning and contemporary popularity.”).

107. E.g., COURTNEY TAYLOR HAMARA, *The Concept of the Rule of Law*, in LAW, LIBERTY, AND THE RULE OF LAW 11 (Imer B. Flores & Kenneth E. Himma eds., 2013) (“It is undeniable that the ‘Rule of Law’ is an important political ideal. In fact, it has been called ‘the most important political ideal today’. The concept is frequently invoked by politicians, the media and scholars in attempts to justify or condemn state actions, political decisions, or whole legal systems. As Jeremy Waldron writes: ‘Open any newspaper and you will see the ‘Rule of Law’ cited and deployed—usually as a matter of reproach, occasionally as an affirmative aspiration, almost always as a benchmark of political legitimacy’. While it might be going too far to say the ‘Rule of Law’ is *universally* accepted, it has indisputably achieved unprecedented support.”); see also NADIA E. NEDZEL & NICHOLAS CAPALDI, *THE ANGLO-AMERICAN CONCEPTION OF THE RULE OF LAW* 118 (2019) (“One of the first modern authors to use the expression ‘rule of law’ was Samuel Rutherford in *Lex, Rex* (1644), meaning ‘the law is king’ as opposed to the traditional formulation *rex lex* (‘the king is law’). James Harrington, in his *Oceana* (1656), argued that an ‘Empire of Laws, and not of Men’ was preferable to an ‘Empire of Men, and not of Laws.’ The expression ‘rule of law’ appears in Samuel Johnson’s *Dictionary* (1755).”).

108. E.g., LINDA L. CARROLL, *THOMAS JEFFERSON’S ITALIAN AND ITALIAN-RELATED BOOKS IN THE HISTORY OF UNIVERSAL PERSONAL RIGHTS* 11 (2019) (“The earliest concepts of the equal rights of all human beings based on a common human nature developed in ancient Greece, in the philosophical works of the Stoics and in the literary-theatrical works of Lucian of Samosata and Euripides. As explicated by Marcia Colish, Stoic thought emphasized unity and nature: the unity of the human mind and body, the unity of all humans, and the unity of humans with the rest of nature, a unity from which human equality flows.”).

109. E. THOMAS SULLIVAN & TONI M. MASSARO, *THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW* 6 (2013).

110. E.g., Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 1 (1997) (“The Rule of Law is a historical ideal, and appeals to the Rule of Law remain rhetorically powerful. Yet the precise meaning of the Rule of Law is perhaps less clear than ever before.”).

111. The editors of a recently published compilation note the “breadth and diversity” of conceptions of the Rule of Law. Linda Hamid & Jan Wouters, *Rule of Law and Areas of Limited Statehood: Introduction and Perspective*, in RULE OF LAW AND AREAS OF LIMITED STATEHOOD: DOMESTIC AND INTERNATIONAL DIMENSIONS 12 (2021); cf. *id.* at 12-13 (“Notwithstanding this variety of approaches, what remains true is that the traditional conceptualization of the RoL, in both its national and international milieus, is very much State-based. Chapter 2 in this volume, for instance, tracks the history of the RoL–State nexus nearly four centuries back. To a large extent, this understanding remains prevalent today. For example, no farther than 2011, the Venice Commission indicated that, viewed in its historical context, the RoL ‘addresses the exercise of power and the relationship between the individual and the state.’”).

principle that law should be known, just, and enforceable.”<sup>112</sup> “[T]he rule of law,” they note, harkening all the way back to Aristotle<sup>113</sup> and the Roman Republic,<sup>114</sup> “has been described as a distinctive characteristic of

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112. SULLIVAN & MASSARO, *supra* note 109, at 3; *see also id.* at 38 (“Today, ‘due process’ has come to be understood as ensuring both procedural and substantive protections.”); *see also id.* at 55 (“In both procedural and substantive due process the overarching goal has been to protect individuals from arbitrary deprivations at the hands of the government. As the historical roots of both procedural and substantive due process illustrate, the challenge in these cases is to strike a sensible balance between the power and interests of the government on the one hand and the liberty or autonomy interests of the individual on the other.”).

113. *See also* THEODORE KONSTADINIDES, *THE RULE OF LAW IN THE EUROPEAN UNION: THE INTERNAL DIMENSION* 47 (2017) (“Aristotle’s much cited maxim ‘the rule of law not the rule of men’ sets the sails for the development of the rule of law as a basis for formal equality and as a restraint to governmental authority. It was an absolute theory of law whose traces can be found in the way states initially adopted the rule-of-law concept in their legal system.”); *cf. id.* (“The reduction of arbitrariness illustrates one of the important values that the rule of law serves . . . The reduction of arbitrariness has always been at the epicenter of the history of the rule of law. Arbitrariness explains the state of affairs where the will of the power-wielders grows into the sole justification for the exercise of power.”); Susanna Frederick Fischer, *Playing Poohsticks with the British Constitution? The Blair Government’s Proposal to Abolish the Lord Chancellor*, 24 PENN. ST. INT’L L. REV. 257, 282 (2005) (“To [A.V.] Dicey, the rule of law consisted of three elements: limits on the arbitrary power of the State, equality before the law, and the supremacy of ordinary law. Many other political theorists, such as F.A. von Hayek and Joseph Raz, have offered further refinements on the doctrine of the rule of law, but these theorists have generally agreed that the rule of law helps to minimize the danger of arbitrary governmental power.”); MAKING PEOPLES HEARD: ESSAYS ON HUMAN RIGHTS IN HONOUR OF GUDMUNDUR ALFREDSSON 45 (Asbjørn Eide et al. eds., 2011) (“References to the rule of law can be found in Plato’s *Republic*, and Aristotle’s *Politics* which surveys the constitutions of more than 200 city-States in ancient Greece. Although ancient in origin, the rule of law began to operate as an important principle of constitutional law and practices in relation to the modern State only once the sovereign will of the people began to triumph over absolute monarchy in Europe.”).

114. LESLI J. FAVOR, *ITALY: A PRIMARY SOURCE CULTURAL GUIDE* 24 (2004) (“Beginning in 509 BC, after ousting their kings, the Roman nobility established a new system of rule, the republic. Two elected leaders called consuls ruled the republic and led the military. Later, a Senate was added to the government system to advise the consuls . . . The Roman Republic became the Roman Empire when, in 27 BC, Augustus Caesar (63 BC-AD 14) declared himself dictator.”); MICHAEL KERRIGAN, *THE UNTOLD HISTORY OF THE ROMAN EMPERORS* 10 (Caitlyn Christensen ed., 2017) (“For the first 480 years of its history, Rome’s citizens had ruled the city on the Tiber. A republic and proud of it, Rome had come into being in 510 BCE, when a group of tribes had banded together to drive out the Etruscan kings.”); BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 11 (2004) (“The Roman contribution to the rule of law tradition was negative as well as positive, with the negative being of much greater consequence. Cicero was the source of the positive. In *The Republic*, written in the first century BC, he condemned the king who does not abide by the law as a despot who ‘is the foulest and most repellant creature imaginable.’ ‘How can anyone be properly called a man who renounces every legal tie every civilized partnership with his own citizens and indeed with the entire human species.’ A contemporary of Julius Caesar, Cicero wrote during the dying stage of the Roman Republic, as it was giving way to autocratic rule. ‘Everyone of standing had realized that the republic’s rule of law and order had given place to the rule of the stronger.’ Cicero’s *The Laws* contains the following passage on the rule of law: ‘You appreciate, then, that a magistrate’s function is to take charge and to issue

English constitutional law” and “can be linked to chapters 39 and 40 of the Magna Carta.”<sup>115</sup>

The Magna Carta (1215)—what William Pitt the Elder (1708-1778), the former Prime Minister of Great Britain, called “the Bible of the English Constitution”<sup>116</sup> along with the Petition of Right (1628) and the English Bill of Rights (1689)—is a major landmark in the Rule of Law’s history.<sup>117</sup> Chapter 39 of the Magna Carta recites:

No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the *law of the land*.<sup>118</sup>

Chapter 40 then states that “[t]o no one will we sell, to no one deny or delay right or justice.”<sup>119</sup> The Magna Carta, or Great Charter, agreed to

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directives which are right, beneficial, and in accordance with the laws. As magistrates are subject to the laws, the people are subject to the magistrates. In fact, it is true to say that a magistrate is a speaking law, and law a silent magistrate.”).

115. SULLIVAN & MASSARO, *supra* note 109, at 7; *see also* CARROLL, *supra* note 108, at 65 (“Sir John Baker describes the deep English history of the rule of law and human rights, concluding that ‘it is not so absurd to propose that the rule of law was an accepted constitutional principle in the Tudor and Stuart period, and that many—though certainly not quite all—of the rights now classified as ‘human rights’ would have been recognized without difficulty by English lawyers of that period.’ He notes that by 1628 or earlier taxation could only be imposed with the consent of Parliament. The separation of the three powers of government as a guarantor of liberty, according to Bernard Bailyn, ‘had been a popular doctrine among the extreme radicals during the Civil War’ and later was favored by Locke and Montesquieu.”).

116. 3 CORRESPONDENCE OF WILLIAM PITT, EARL OF CHATHAM 402 (William Stanhope Taylor & John Henry Pringle eds., 1838).

117. LARRY MAY, *Bystanders, the Rule of Law, and Criminal Trials*, in GETTING TO THE RULE OF LAW 245 (James E. Fleming ed., 2011) (“[The Magna Carta] was an agreement extracted from King John of England by feudal barons. . . [and] . . . was the result of negotiations to establish the rule of law out of a patchwork quilt of feudal rules and abuse at the hands of the king’s sheriffs.”); Beverley McLachlin, *Values and the Courts: Maintaining the Rule of Law in the Global World*, 49 INT’L LAWYER 105, 106 (2015) (“It took a long time for modern societies to arrive at the tacit understanding that the rule of law is fundamental to nationhood. Eight hundred years ago, on a muddy field west of London, England, King John reluctantly affixed the Royal Seal to the *Magna Carta*, which proclaimed the revolutionary idea that even the King was subject to the law. Centuries later, Lord Coke took up the cause and used it to cement the principle of Parliamentary supremacy and the role of the courts as the ultimate arbiters of justice.”).

118. SULLIVAN & MASSARO, *supra* note 109, at 8; *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 282 (1998) (“[D]ue process of law connoted a suitably generally, evenhanded law. According to Cooley’s landmark treatise, perhaps ‘[n]o definition [of due process] is more often quoted’ than Daniel Webster’s in his famous *Dartmouth College* oral argument: ‘due process’ meant ‘law of the land’ by which ‘is most clearly intended the general law . . . . The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of general rules . . . .”).

119. SULLIVAN & MASSARO, *supra* note 109, at 8.



at Runnymede near Windsor, made clear that land-owning barons were not subject to King John's capricious whims,<sup>120</sup> with Henry of Bracton (1210-c. 1268)—in his famous legal treatise, *De Legibus et Consuetudinibus Angliae* (*On the Laws and Customs of England*)—declaring: “Nothing is more fitting for a sovereign than to live by the laws, nor is there any greater sovereignty than to govern according to law, and he ought properly to yield to the law what the law has bestowed upon him, for the law makes him king.”<sup>121</sup> “The whole constitutional history of England is little more than a commentary on Magna Carta,” Dr. William Stubbs (1825-1901), the Bishop of Oxford and a scholar of medieval English history, once famously remarked.<sup>122</sup>

Fidelity to the Rule of Law, a necessity for the protection of people's fundamental human rights,<sup>123</sup> stands in sharp contrast to an arbitrary or variable application of the law or the medieval concept of the “divine right of kings,”<sup>124</sup> that now long-antiquated understanding of law that once gave monarchs legitimacy through the notion that they had God's mandate and were pre-ordained to inherit the crown. In *The Divine Right of Kings, Proved from the Principles of the Church of England* (1683), John Burrell, the Rector of Euston, preached a sermon

120. Letter to the Editor, *Bull-Baiting*, WATERFORD MIRROR, Dec. 30, 1801, at 2 (“King John, it is well known, wished to rule without law or constitution.”).

121. TAMANAHA, *supra* note 114, at 26; *see also* B. J. Comaskey, *Bracton, Henry De*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/people/social-sciences-and-law/law-biographies/henry-de-bracton> (last updated May 17, 2018).

122. DAVID ROLLISON, A COMMONWEALTH OF THE PEOPLE: POPULAR POLITICS AND ENGLAND'S LONG SOCIAL REVOLUTION, 1066-1649, at 83 (2010); HELEN LOADER, MRS HUMPHRY WARD AND GREENIAN PHILOSOPHY: RELIGION, SOCIETY AND POLITICS 64 n.27 (2019).

123. DEP'T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GEN., INTRODUCTION TO THE DEPARTMENT OF JUSTICE JOURNAL OF FEDERAL LAW AND PRACTICE 1 (2019) (“In the late seventeenth century, political philosopher John Locke advocated for a rule-of-law system in which government was ‘directed to no other end but the peace, safety, and public good of the people’ and citizens were governed by ‘established standing laws, promulgated and known to the people, and not by extemporary decrees.’ The founders enshrined this principle in our constitutional system by creating ‘a government of laws, not of men.’ This commitment to the rule of law formed the foundation that has enabled our society to thrive.”); *see also* Jacob Reynolds, *The Rule of Law and the Origins of the Bill of Attainder Clause*, 18 ST. THOMAS L. REV. 177, 179 (2005) (noting that John Locke made this statement concerning the Rule of Law: “Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where that rule prescribes not: and not to be subject to the inconstant, uncertain, arbitrary will of another man.”).

124. NORMAN ABJOERSEN, HISTORICAL DICTIONARY OF DEMOCRACY 122 (2019) (noting that the theory of “divine right of kings . . . was popularized by the French philosopher Jean Bodin in his book *The Six Bookes of a Commonweale* (1576).”). An ancient maxim of English constitutional law was that “the king can do no wrong.” *Langford v. United States*, 101 U.S. 341, 342 (1879); Barry L. Loftus, Note, *Seminole Tribe and Superfund: A Federalism Gamble*, 31 IND. L. REV. 183, 183 n.1 (1998).

in which he declared that “Kings by virtue of their Descent . . . have a *Divine Right* to Govern us” and that “Rebellion against them” would not only “cut us off from the *Church of England*, but rescind us from *Christianity* itself.”<sup>125</sup> That late seventeenth-century sentiment is a far cry from what America’s founders wrote in the Declaration of Independence less than one hundred years later: “The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.”<sup>126</sup>

#### IV. THE ROLE OF THE AMERICAN REVOLUTION

The American Revolution, in which a newly forged republic, the United States of America, broke away from George III and British tyranny after Parliament’s adoption of the Stamp Act (1765) and the Intolerable Acts (1774),<sup>127</sup> was itself premised on a nascent version of what we think of today as the Rule of Law.<sup>128</sup> In 1776, the same year that the Continental Congress issued the American Declaration of Independence,<sup>129</sup> it was Thomas Paine, in his revolutionary pamphlet

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125. JOHN BURRELL, *THE DIVINE RIGHT OF KINGS, PROVED FROM THE PRINCIPLES OF THE CHURCH OF ENGLAND IN A SERMON PREACH’D AT THETFORD, JANUARY 30TH, 1682/3*, at 2 (1683).

126. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

127. Mottos and flags are a good indication of the motivations behind both the American and French Revolutions. See JAMES F. HARRIS, *PHILOSOPHY AT 33 1/3 RPM: THEMES OF CLASSIC ROCK MUSIC* 147 (1993) (“‘Liberté, Égalité, Fraternité’ will forever be the cry of the French Revolution. ‘No taxation without representation’, attributed to James Otis (1763), is now identified with the American democratic struggle against the British monarchy. And ‘Don’t Tread on Me’ was the motto on the first ‘official’ American flag (1775).”).

128. See, e.g., Fred D. Miller, Jr., *Aristotle and American Classical Republicanism*, in JUSTICE V. LAW IN GREEK POLITICAL THOUGHT 184 (Leslie G. Rubin ed., 1997) (observing that John Adams asserted that, “the justification of the American Revolution rested on ‘the principles of Aristotle and Plato, of Livy and Cicero, and Sidney, Harrington, and Locke,’” and that in his *Defence of the Constitutions of the Government of the United States of America*, “Adams endorsed in principle Aristotle’s understanding of *the rule of law*: ‘a government where the *laws alone* should prevail, would be the kingdom of God’; and ‘[o]rder is law, and it is more proper that law should govern, than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians, and the servants of the laws.’”); JOHN PHILLIP REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 60 (1988) (“Arbitrary power, like slavery and licentiousness, was the opposite of liberty. It was also the opposite of law, and in that fact lies the first ingredient in the positive definition of liberty. For just as people thought the ‘rule of law’ the opposite of arbitrary power—‘Law and arbitrary power are at eternal hostility,’ Edmund Burke asserted—so they thought of law as the central pillar of liberty.”).

129. DECLARATION OF INDEPENDENCE (U.S. 1776). The Declaration of Independence, after reciting “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness,” states:

*Common Sense*, who so forcefully declared: “[I]n America *the law is king*. For as in absolute governments the king is law, so in free countries the law *ought* to be king; and there ought to be no other.”<sup>130</sup>

America’s founders carefully studied Greek philosophy, the Roman republic, and England’s constitutional history,<sup>131</sup> with the 1783 list of books James Madison recommended “to be imported for the use of the

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That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the government,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

*Id.* para. 2.

130. THOMAS PAINE, *COMMON SENSE* 36 (Peter Eckler, N.Y. 1918); CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 35 (1993); *see also* THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM 15-16 (Paul Schiff Berman, ed. 2020) (noting that Lord Coke “refused to place the king beyond or above the domain of law” and that, as “part of the Enlightenment movement to limit the power of kings and assert a higher rule of law,” “one can see a direct line from Coke to Thomas Paine, who declared that in the new United States of America, ‘law is king’ ”); O. John Rogge, *The Rule of Law*, 46 ABA J. 981, 981 (1960) (“Insculpted in stone over the portals of the main entrance of the Harvard Law School’s Langdell Hall are words which Edward Coke in his famous Sunday morning conference (1608) with James I of England quoted himself as saying, attributing them to Bracton, NON SUB HOMINE SED SUB DEO ET LEGE [not under man but under God and the law]. And the idea embodied in these words—which we express variously in such phrases as the supremacy of law, the law of the land, due process of law, and the rule of law; and in the statement, we are a government of laws and not of men—does have origins which go back to Bracton’s time, and even farther. Bracton was an English judge and writer who died in 1268.”).

131. *See generally* CARL J. RICHARD, *GREEKS AND ROMANS BEARING GIFTS: HOW THE ANCIENTS INSPIRED THE FOUNDING FATHERS* (2008) (discussing the inspiration that America’s founders drew from ancient times); *see also* CLAY S. JENKINSON, *REPAIRING JEFFERSON’S AMERICA: A GUIDE TO CIVILITY AND ENLIGHTENED CITIZENSHIP* 8 (2020) (noting that Thomas Jefferson “knew seven languages, three ancient and four modern”). For example, in *The Federalist No. 34*, Alexander Hamilton—writing as “Publius”—made this observation “To the People of the State of New-York” in making the case for the ratification of the U.S. Constitution:

It is well known, that in the Roman Republic, the Legislative authority in the last resort, resided for ages in two different political bodies; not as branches of the same Legislature, but as distinct and independent Legislatures, in each of which an opposite interest prevailed; in one, the Patrician—in the other, the Plebeian. Many arguments might have been adduced to prove the unfitness of two such seemingly contradictory authorities, each having power to annul or repeal the acts of the other. But a man would have been regarded as frantic, who should have attempted at Rome, to disprove their existence. It will readily be understood, that I allude to the Comitia Centuriata, and Comitia Tributa. The former, in which the people voted by Centuries, was so arranged as to give a superiority to the Patrician interest: in the latter, in which numbers prevailed, the Plebeian interest had an entire predominancy. And yet, these two Legislatures co-existed for ages, and the Roman Republic attained to the utmost height of human greatness.

THE FEDERALIST NO. 34 (Alexander Hamilton) (Harold C. Syrett ed., N.Y.: Columbia Univ. Press 1962), <https://founders.archives.gov/documents/Hamilton/01-04-02-0191>.

United States in Congress Assembled” including titles on topics such as the “Law of Nature and Nations”; “Law” and “Politics”; and English, French, Italian, Greek, Roman, Scottish and Spanish history.<sup>132</sup> When Virginia plantation owner George Mason drafted the Virginia Declaration of Rights (1776), he looked to the English Bill of Rights and the Magna Carta for inspiration,<sup>133</sup> with Mason’s biographer, William Hyland, observing that Mason “mastered the law, classics, and political philosophy” in his uncle John Mercer’s library.<sup>134</sup> In drafting the Constitution and the U.S. Bill of Rights, James Madison, in turn, looked to historical precedents and the Virginia Declaration of Rights and other revolutionary state constitutions that were modeled in part on English constitutional protections.<sup>135</sup> The U.S. Constitution’s Eighth Amendment—to give but one example—is derived from English law and Virginia’s 1776 Declaration of Rights.<sup>136</sup> The phrase “cruel and unusual punishments,” long-time U.S. Supreme Court Justice Joseph Story observed in his time, was “an exact transcript” of a clause in the English Bill of Rights, with George Mason adopting the phrase for use in Virginia’s declaration before the drafters of the U.S. Bill of Rights borrowed the phrase, too.<sup>137</sup>

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132. JAMES MADISON, REPORT ON BOOKS FOR CONGRESS (1783), <https://founders.archives.gov/documents/Madison/01-06-02-0031>. Madison himself had closely studied history. 10 THE PAPERS OF JAMES MADISON 27 MAY 1787–3 MARCH 1788, at 273-283 (1977) (Robert A. Rutland et al. eds., Univ. of Chi. Press 1977).

133. Jency Megan Butler, *Shocking the Eighth Amendment’s Conscience: Applying a Substantive Due Process Test to the Evolving Cruel and Unusual Punishments Clause*, 43 HASTINGS CONST. L.Q. 861, 865 (2016) (“The Virginia Declaration of Rights, written by George Mason, mirrored the English Bill of Rights.”); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1242 (1987) (“[T]he draftsman of the Virginia declaration, George Mason, a planter without formal legal training but well-versed in English constitutional history, simply adopted wholesale the 1689 English Bill of Rights when he drafted Virginia’s version in 1776.”).

134. WILLIAM G. HYLAND JR., *GEORGE MASON: THE FOUNDING FATHER WHO GAVE US THE BILL OF RIGHTS* 64 (2019).

135. Lewis F. Powell, Jr., *Our Bill of Rights*, 25 IND. L. REV. 937, 941 (1992) (“The Bill of Rights was written in a way that permitted the evolution I have highlighted. In drafting the Bill, Madison relied principally on Virginia’s Declaration of Rights. The Virginia Declaration, written by George Mason, itself invoked the language of earlier charters, such as the English Bill of Rights of 1689 and the Magna Carta, which was written in 1215. Drawing on these historic documents, Madison drafted broadly-worded, forward-looking guarantees . . .”).

136. John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution’s Eighth Amendment*, 27 WM. & MARY BILL RTS. J. 989, 996-97 (2019).

137. H. Brent McKnight, *How Shall We Then Reason? The Historical Setting of Equity*, 45 MERCER L. REV. 919, 953 (1994). For a full history of the Eighth Amendment’s origins, see generally JOHN D. BESSLER, *CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS’ EIGHTH AMENDMENT* (2012); see also John D. Bessler, *From the Founding to the Present: An Overview of Legal Thought and the Eighth Amendment’s*

It was American revolutionary John Adams, who—in 1775, using the penname ‘Novanglus’<sup>138</sup> and echoing the words of the English political theorist James Harrington<sup>139</sup>—wrote of “[a] government of laws, and not of men.”<sup>140</sup> Adams had carefully studied Roman history,<sup>141</sup>

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*Evolution*, in THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 11-27 (Meghan J. Ryan & William W. Berry III eds., 2020).

138. John Adams, *To the Inhabitants of the Colony of Massachusetts-Bay*, Mar. 6, 1775, FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/06-02-02-0072-0008>; see also JONATHAN I. ISRAEL, DEMOCRATIC ENLIGHTENMENT: PHILOSOPHY, REVOLUTION, AND HUMAN RIGHTS, 1750-1790, 446 (2011) (“Typical of the intellectual make-up of American mainstream Enlightenment was the *Novanglus*, a series of letters penned in 1774-5, later republished many times, by John Adams (1735-1826), a young Massachusetts lawyer and future president with strong ‘classical republican’ and socially and politically conservative leanings, elected to the First Continental Congress in 1774. In this tract, Adams, while disavowing any intention of seeking American Independence, glories in ‘revolution principles’, meaning those of 1688 which he considers ‘are the principles of Aristotle and Plato, of Livy and Cicero, and Sidney, Harrington and Locke.’ He insists on Americans’ ‘attachment to their constitution’ (even though this was long before there was any written ‘constitution’), arguing in line with both Locke and *Cato’s Letters* that defence of this ‘constitution’ would justify armed rebellion against the British crown.”); cf. STEVE PINCUS, 1688: THE FIRST MODERN REVOLUTION 3 (2009) (“England’s Glorious Revolution of 1688-89 holds a special place in our understanding of the modern world and the revolutions that had a hand in shaping it.”); *id.* at 3-4 (noting that James II “ran roughshod over English law” and “insisted on his right to defy” Parliament, with the author, Steve Pincus, observing: “Men and women all over the English-speaking world once knew what happened in England’s Revolution of 1688-89. In 1685, the Catholic King James II inherited the crown of England. In 1689, the English people agreed to replace him with the Protestants King William III and Queen Mary II. In the intervening years, James II gradually and myopically alienated the moderate and sensible English people.”); *The Rule of Law*, STAN. ENCYCLOPEDIA OF PHIL. (June 22, 2016), <https://plato.stanford.edu/entries/rule-of-law/> (noting that John Locke, “in the second of his *Two Treatises of Government* (1689) emphasized the importance of governance through ‘established standing Laws, promulgated and known to the People’ ” and “contrasted this with rule by ‘extemporary Arbitrary Decrees’ ”).

139. JOHN TOLAND, THE OCEANA OF JAMES HARRINGTON, ESQ.; AND HIS OTHER WORKS: WITH AN ACCOUNT OF HIS LIFE PREFIX’D 240 (1737) (asking “*Whether a Commonwealth be rightly defin’d to be a Government of Laws and not of Men, and a Monarchy to be the Government of some Man, or a few Men, and not of Laws?*”); see also Gerald E. Rosen & Kyle W. Harding, *Reflections upon Judicial Independence as We Approach the Bicentennial of Marbury v. Madison: Safeguarding the Constitution’s “Crown Jewel”*, 29 FORDHAM URB. L.J. 791, 804 n.72 (2002) (“John Adams, writing in the *Boston Gazette*, attributed the phrase ‘a government of laws and not of men’ to James Harrington, an English political theorist. 1 THE FOUNDERS’ CONSTITUTION 336 (Philp B. Kurland & Ralph Lerner eds., 1987). More to our purposes, John Marshall appropriated the phrase in *Marbury v. Madison*, 5 U.S. 137, 163 (1803).”).

140. OXFORD TREASURY OF SAYINGS AND QUOTATIONS 194 (Susan Ratcliffe, ed., 4th ed. 2011); see also THE PUBLIC ADVERTISER, June 15, 1786, at 2 (a letter to the printer of the newspaper began: “True freedom consists in being governed, not by men, but by states, and known laws. Every deviation from the established rule of law leads to inextricable error and uncertainty.”).

141. See, e.g., JAMES MULDOON, JOHN ADAMS AND THE CONSTITUTIONAL HISTORY OF THE MEDIEVAL BRITISH EMPIRE 227 (2018) (“Quoting from James Harrington (1611–1677), Adams pointed out that under the Republic the Romans had created colonies for discharged soldiers and surplus urban populations within the boundaries of Italy but not beyond.”); [June

and he voraciously read works of political philosophy.<sup>142</sup> In his *Thoughts on Government* (1776), published the same year that the Continental Congress issued the Declaration of Independence, he repeated that “government of laws” mantra,<sup>143</sup> one that made a deep impression on him from a young age.<sup>144</sup> In that political pamphlet, an anonymous reply to Thomas Paine’s *Common Sense*, John Adams specifically identified some of the English philosophers—among them, James Harrington, John Locke and Algernon Sidney—who had inspired

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1771]: [from the *Diary of John Adams*], FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/01-02-02-0001-0005> (in a diary entry dated June 13, 1771, John Adams observed that “Caesar, by destroying the Roman Republic, made himself perpetual Dictator”).

142. RICHARD ALAN RYERSON, JOHN ADAMS’S REPUBLIC: THE ONE, THE FEW, AND THE MANY 401 (2016) (noting that John Adams became “interested in the republican tradition” and “his attention was drawn to certain earlier political writers: to England’s republican martyr, Algernon Sidney; to its leading commonwealth theorist, James Harrington”; “Nearly all of Adams’s favorite authorities were vitally concerned with the early modern history of western Europe, and several studied with care the ancient Roman Republic and the earliest republics of Greece. By 1774, his own provincial veneration for New England’s colonial past, so prominently displayed in his early *Dissertation on the Canon and the Feudal Law* (1765), and his revered authors’ memories of medieval and Renaissance England and Italy, and of ancient Rome and Greece, thoroughly dominated his reading and writing.”).

143. Richard B. Bernstein, *John Adams’s Thoughts on Government, 1776*, in ROOTS OF THE REPUBLIC: AMERICAN FOUNDING DOCUMENTS INTERPRETED 118, 122-23 (Stephen L. Schechter ed., 1990) (“Of all the advice and suggestions produced for writing constitutions in the early years of the Revolution, perhaps the most important and influential was John Adams’s *Thoughts on Government*. Adams long had been fascinated by the intricacies of constitutional issues and had acquired a reputation for his extensive study of the subject.”); *id.* at 124 (“*Thoughts on Government: Applicable to the Present State of the American Colonies*. In a *Letter from a Gentleman to his Friend* appeared in Philadelphia in late April of 1776 and was published several months later in Boston.”).

144. John Adams, *I. To William Hooper, 27 March 1776*, FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/06-04-02-0026-0002> (last visited Mar. 10, 2021) (“In my early Youth, the Works of Sidney, Harrington, Lock, Milton, Nedham, Neville, Burnet, Hoadley, were put into my Hands; and the miserable Situation of our Country, for fifteen Years past, has frequently reminded me of their Principles and Reasonings. They have convinced me that there is no good Government but what is Republican. The British Constitution itself is Republican, for I know of no better Definition of a Republic than this, that it is an Empire of Laws and not of Men: and therefore, as I look upon Republics to be the best of Governments So I think, that particular Form of Government, or in other Words, that particular Arrangement, and Combination of the Powers of Society, which is best calculated to Secure an exact and impartial Execution of the Laws, is the best Republic.”); John Adams, *II. To John Penn, 27 March 1776*, FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/06-04-02-0026-0003> (last visited Mar. 10, 2021) (“A Man must be indifferent to Sneer and Ridicule, in Some Companies to mention the Names of Sidney, Harrington, Lock, Milton, Nedham, Neville, Burnet, Hoadley . . . . These great Writers however, will convince any Man who has the Fortitude to read them, that all good Government is Republican: that the only valuable Part of the British Constitution is so; for the true Idea of a Republic, is ‘An Empire of Laws and not of Men’: and therefore as a Republic is the best of Governments so, that particular Combination of Power, which is best contrived for a faithfull Execution of the Laws, is the best of Republics.”).

his thinking.<sup>145</sup> James Harrington's *The Commonwealth of Oceana* (1656) had captivated Adams, and Adams expressed the view that "good government is an empire of laws."<sup>146</sup>

Like Adams, George Washington—the first President of the United States—embraced the notion of a government of laws. In September 1789, not long after the U.S. Constitution's ratification,<sup>147</sup> Washington

145. PHYLLIS LEE LEVIN, ABIGAIL ADAMS: A BIOGRAPHY 78 (2001) (noting that John Adams "was stirred to write an anonymous reply, called *Thoughts on Government*, to what he thought were Paine's naïve notions about prospective new governments in America" and that *Thoughts on Government*, "(published in Philadelphia by John Dunlap on April 22, 1776), synthesized John's lengthy studies of British law, of the principles of Aristotle and Plato, of Livy and Cicero, of Sidney, Harrington, and Locke"; Bernstein, *supra* note 143, at 129, 130-31 ("A man must be indifferent to the sneers of modern Englishmen to mention in their company, the names of Sidney, Harrington, Locke, Milton, Nedham, Neville, Burnet, and Hoadley.—No small fortitude is necessary to confess that one has read them. The wretched condition of this country, however, for ten or fifteen years past, has frequently reminded me of their principles and reasonings. They will convince any candid mind, that there is no good government but what is Republican. That the only valuable part of the British constitution is so; because the very definition of a Republic, is 'an Empire of Laws, and not men.' That, as a Republic is the best of governments, so that particular arrangement of the powers of society, or in other words that form of government, which is best contrived to secure an impartial and exact execution of the laws, is the best of Republics."); *see also id.* at 130 n.3 (an editorial note of historian Richard B. Bernstein to John Adams's *Thoughts on Government* observes: "The historical figures cited here by Adams are all heroes of the seventeenth-century English struggles against the tyranny, real or feared, of the Stuart kings. They include the martyr Algernon Sidney (1622-1683), executed by the government of Charles II for the manuscript of his posthumously published *Discourses concerning Government*; [James] Harrington (1611-1677), whose utopian work *Oceana* was a landmark in the history of English republican thought; John Locke (1634-1704), the renowned author of the *Essay Concerning Human Understanding* and the *Two Treatises of Government*; Marchamont Nedham (1620-1678), whose *The Excellencie of a Free State* and other works on republican government John Adams reviewed and commented on in his three-volume *A Defence of the Constitutions of the United States* (1787-1788); Henry Neville (1620-1694), a contemporary and intellectual ally of Harrington, and the author of *Plato Redivivus*; the prominent Whig historian and bishop of Salisbury Gilbert Burnet (1643-1715), who preached the coronation sermon at the coronation of William and Mary in 1689; and Benjamin Hoadly (1675-1761), bishop of Bangor, Hereford, Salisbury, and Winchester, and another noted Whig controversialist. The best study of these figures and their intellectual and political context is Caroline Robbins, *The Eighteenth-Century Commonwealthman: Studies in the Transmission, Development and Circumstance of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies* (Cambridge, Mass., 1959; paperback, with new preface, New York, 1968).").

146. James R. Maxeiner, *Building a Government of Laws: Adams and Jefferson 1776–1779*, in *THE LEGAL DOCTRINES OF THE RULE OF LAW AND OF THE LEGAL STATE* (RECHTSSTAAT) 267-77 (James Silkenat, et al. eds., 2014).

147. The ratification of the U.S. Constitution, which created three branches of government, was marred by the abject failure of the Framers to abolish slavery and to afford every person the right to vote and to participate equally in America's newly forged republic. *See, e.g.,* DAVID WALDSTREICHER, *SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* 3 (2009) ("The Constitution never mentions slavery. The word does not appear. And yet slavery is all over the document. Of its eighty-four clauses, six are directly concerned with slaves and their owners. Five others had implications for slavery that were

wrote a telling letter to Pennsylvania's legislature.<sup>148</sup> "It should be the highest ambition of every American," he wrote, "to extend his views beyond himself, and to bear in mind that his conduct will not only affect himself, his country, and his immediate posterity; but that its influence may be co-extensive with the world, and stamp political happiness or misery on ages yet unborn." To obtain that end, "to establish the government of *laws*," he observed, "the *union* of these States is absolutely necessary." As Washington's letter emphasized:

[I]n every proceeding, this great, this important object should ever be kept in view; and so long as our measures tend to this; and are marked with the wisdom of a well informed and enlightened people, we may reasonably hope, under the smiles of Heaven, to convince the world that the happiness of nations can be accomplished by pacific revolutions in their political systems, without the destructive intervention of the sword.<sup>149</sup>

Also referring to the government of laws concept in another letter written shortly thereafter to Catharine Sawbridge Macaulay Graham, a prominent English historian known for her eight-volume *The History of England from the Accession of James I to the Revolution*,<sup>150</sup> George

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considered and debated by the delegates to the 1787 Constitutional Convention and the citizens of the states during ratification."); FERGUS M. BORDEWICH, *THE FIRST CONGRESS: HOW JAMES MADISON, GEORGE WASHINGTON, AND A GROUP OF EXTRAORDINARY MEN INVENTED THE GOVERNMENT* 6 (2016) ("To secure ratification of the Constitution in the South, Yankee delegates agreed that each slave would count as three-fifths of a person for the purpose of apportioning the size of a state's delegation in the House of Representatives.").

148. Letter from George Washington, President, U.S., to the Pennsylvania Legislature (Sept. 12, 1789), <https://founders.archives.gov/documents/Washington/05-04-02-0014>.

149. Washington's letter also read:

The virtue, moderation, and patriotism which marked the steps of the American People in framing, adopting, and thus far carrying into effect our present system of Government, has excited the admiration of Nations; and it only now remains for us to act up to those principles, which should characterize a free and enlightened People, that we may gain respect abroad and ensure happiness and safety to ourselves and to our posterity.

*Id.*

150. See Margaret Kritzberg & Emily Yankowitz, *Catharine Sawbridge Macaulay Graham 1731-1791*, GEORGE WASHINGTON'S MT. VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/catharine-sawbridge-macaulay-graham-1731-1791/> (last visited Mar. 10, 2021) ("Catharine Sawbridge Macaulay Graham was a prominent English historian and writer at the forefront of radical transatlantic politics in the eighteenth century. She is widely acknowledged as England's first major female historian and pamphleteer. Graham rose to international prominence for her scholarship and support of the American and French Revolutions. Her commitment to republican ideals endeared her to men such as George Washington and John Adams, while bringing her into conflict with conservative politicians like Edmund Burke."). In a letter written from New York on January 9, 1790, George Washington had this to say on the subject to Catharine Sawbridge Macaulay Graham:



Washington—on the Fourth of July in 1793, having just taken the presidential oath of office for a second time a few months earlier—likewise wrote to the residents of Alexandria, Virginia:

To complete the American character, it remains for the citizens of the United States to shew to the world, that the reproach heretofore cast on republican Governments for their want of stability, is without foundation, when that government is the deliberate choice of an enlightened people. And I am fully persuaded, that every well-wisher to the happiness and prosperity of this country will evince by his conduct that we live under a government of laws . . . .<sup>151</sup>

Washington—like other founders—thus had an abiding commitment to the Rule of Law as he understood it,<sup>152</sup> though he, too, failed to live up to its promise as he, among other things, kept people enslaved at his Mount Vernon plantation throughout his life.<sup>153</sup> In his will, George Washington (1732-1799)—the military leader turned President and statesman—only agreed to emancipate those he held in human bondage upon the death of his wife, Martha Washington (1731-1802).<sup>154</sup>

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The establishment of our new Government seemed to be the last great experiment, for promoting human happiness, by reasonable compact, in civil Society. It was to be, in the first instance, in a considerable degree, a government of accommodation as well as a government of Laws. Much was to be done by prudence, much by conciliation, much by *firmness*.

See Letter from George Washington, President, U.S., to Catharine Sawbridge Macaulay Graham (Jan. 9, 1790), <https://founders.archives.gov/documents/Washington/05-04-02-0363>.

151. 2 JARED SPARKS, *THE LIFE OF GEORGE WASHINGTON* 315 (1839).

152. See GLENN A. PHELPS, *GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM* 124-25 (1993).

153. *10 Facts About Washington & Slavery*, GEORGE WASHINGTON'S MOUNT VERNON, <https://www.mountvernon.org/george-washington/slavery/ten-facts-about-washington-slavery/> (last visited Mar. 10, 2021) (noting that “[o]f the 317 enslaved people living at Mount Vernon in 1799,” the year of George Washington’s death, 123 individuals “were owned by George Washington himself” and 153 enslaved persons at Mount Vernon in 1799 “were dower slaves from the Custis estate.”).

154. *Id.* (noting that George Washington “wrote his will several months before his death in December 1799” and, in it, “left directions for the eventual emancipation of his slaves after the passing of Martha Washington”); see also FRITZ HIRSCHFELD, *GEORGE WASHINGTON AND SLAVERY: A DOCUMENTARY PORTRAYAL* 3 (1997) (“Washington could have done much more during his lifetime to bring about the emancipation of slaves, had he wanted to. If, for instance, he had harnessed the momentum of his immense popularity and great authority at the peak of his career to support actively the aggressive and well-organized late-eighteenth-century abolitionist movement, he might well have been instrumental in helping the abolitionists to prevail in the South. If so, the country might well have been spared the bitter agony of four years of civil war in 1861–1865.”).

The government-of-laws idea was repeated by other early Americans,<sup>155</sup> including Thomas Jefferson,<sup>156</sup> John Quincy Adams,<sup>157</sup> Alexander Hamilton,<sup>158</sup> and the members of the U.S. Supreme Court in *Marbury v. Madison*.<sup>159</sup> John Adams, the idea's most famous proponent

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155. James D. Heiple, *Introduction*, 28 LOY. U. CHI. L.J. 661, 662 (1997) ("Among this country's founders were many who had experienced firsthand the oppression of arbitrary rulers. These earliest Americans desired to create a regime which would be at once strong enough to govern effectively and yet restrained in its powers. Simply put, they sought to implement the rule of law—and to do so more fully and completely than ever before in human history."); James R. Maxeiner, *Building a Government of Laws: Adams and Jefferson 1776-1779*, at 267, 273 (Univ. of Balt. Law, Legal Studies Research Paper No. 2013-12, 2014) ("In the eighteenth century, founders of the American republic, such as John Adams and Thomas Jefferson, sought a 'government of laws and not of men.' Their nineteenth century successors, Justice Joseph Story, President Abraham Lincoln and codifier David Dudley Field, looked to written law to govern.").

156. Letter from Thomas Jefferson, Sec'y of State, U.S., to Thomas Mann Randolph, Jr., State Senator, Va. (Jan. 7, 1793), <https://founders.archives.gov/documents/Jefferson/01-25-02-0028> (making reference to "a government of laws addressed to the reason of the people, and not to their weaknesses").

157. In 1795, in a letter to his mother, Abigail Adams, John Quincy Adams—later the sixth President of the United States—similarly wrote of "a free Government, a Government of Laws." See Letter from John Quincy Adams, Minister to the Netherlands, U.S., to Abigail Adams, Mother of John Quincy Adams (July 30, 1795), <https://founders.archives.gov/documents/Adams/04-11-02-0005>.

158. See Alexander Hamilton, *Remarks on the Repeal of the Judiciary Act, First Version* [11 February 1802], NAT'L ARCHIVES, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-25-02-0292-0001> (last visited Mar. 10, 2021) ("Gen. Hamilton again rose . . . He declared in the most emphatic manner, that if the bill for the repeal passed, and the independence of the Judiciary was destroyed, the constitution was but a shadow, and we should, e'er long, be divided into separate confederacies, turning our arms against each. He solemnly called heaven to witness his devout desire that the system of government adopted among us might prosper; but his hope in their prosperity was much weakened, when he perceived them becoming the spoil of popular intrigue, and one after another 'crumbling beneath him.' Between a government of laws, administered by an independent Judiciary, or a despotism supported by an army, there was no medium. If we relinquish one, we must submit to the other.").

159. *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); see also *United States v. Dickson*, 40 U.S. 141, 162 (1841) (Story, J.) ("[I]t is not to be forgotten, that ours is a government of laws, and not of men; and that the judicial department has imposed upon it by the constitution, the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it."); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 307-08 (1947) (Frankfurter, J., concurring) ("The historic phrase 'a government of laws and not of men' epitomized the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights, pt. 1, art. 30, he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. 'A government of laws and not of men' was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law, as finally pronounced by this Court. Even this Court has the last say only for a time. Being composed of fallible men,

in America, himself incorporated the concept into the Massachusetts Constitution of 1780,<sup>160</sup> the written instrument<sup>161</sup> that is one of the world's oldest, continuously existing constitutions.<sup>162</sup> And he, like so

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it may err. But revision of its errors must be by orderly process of law. The Court may be asked to reconsider its decisions, and this has been done successfully again and again throughout our history. Or, what this Court has deemed its duty to decide may be changed by legislation, as it often has been, and, on occasion, by constitutional amendment.”).

160. See MASS CONST. of 1780, art. XXX, [https://press-pubs.uchicago.edu/founders/documents/bill\\_of\\_rightss6.html](https://press-pubs.uchicago.edu/founders/documents/bill_of_rightss6.html) (“In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”); Jonathan Israel, *The Radical Enlightenment's Critique of the American Revolution, in RESISTANCE TO TYRANTS, OBEDIENCE TO GOD: REASON, RELIGION, AND REPUBLICANISM AT THE AMERICAN FOUNDING* 43 (Dustin Gish & Daniel Klinghard, eds. 2013) (“Adams, a follower of Montesquieu in several respects, especially sought a firm separation of powers, rendering the legislature quite separate from his strong executive and both separate from the ‘judicial power.’”); JOHN ADAMS, THE REPORT OF A CONSTITUTION OR FORM OF GOVERNMENT FOR THE COMMONWEALTH OF MASSACHUSETTS, 28-31 OCTOBER, 1779, <https://founders.archives.gov/documents/Adams/06-08-02-0161-0002> (last visited Mar. 10, 2021) (“In the government of the Commonwealth of Massachusetts, the legislative, executive, and judicial power, shall be placed in separate departments, to the end that it might be a government of laws and not of men.”).

161. Bernstein, *supra* note 143, at 118, 122 (“The Americans’ emphasis on written constitutions was rooted in American colonial history and the circumstances of the Revolution. The term *constitution* in English usage denoted the whole complex of laws, common-law rules, customs, usages, and traditions that shape the political relations, rights, and responsibilities of the polity and its members. As part of the founding of colonies in North America, the Crown granted—or the colonists wrote—colonial charters setting forth the guidelines under which political power would be exercised; these new societies were at the same time extensions of England and distinct political communities with their own concerns and unique local conditions. Disputes between the colonists and representatives of the Crown over the extent of Crown authority and colonial self-government often focused on these written instruments of government; this mode of constitutional and political argument was still fresh in American memories at the outbreak of the constitutional crisis of the 1760s and 1770s. With the drift toward independence, the Americans again recognized the need to specify the basis for their new, independent political organizations in written instruments of government. This perceived necessity accorded with their sense that principles of government were immutable laws of nature, and thus had to be fixed in writing in a form distinct from and superior to mere statutes; by contrast, the unwritten English constitution, subject to the shifts and convulsions of ordinary politics, was not a sufficient bulwark against oppression.”).

162. JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 39 (4th ed. 2016) (noting that the 1780 Massachusetts Constitution, “amply amended, is the oldest continuously operating constitution in the world”); George C. Homans, *John Adams and the Constitution of Massachusetts*, 125 PROC. OF THE AM. PHIL. SOC’Y 286 (1981) (“On October 25, 1780, two hundred years ago, went into effect what is now the oldest written constitution in the world that has remained in continuous operation, the Constitution of the Commonwealth of Massachusetts. It was largely the work of John Adams, later second president of the United States.”); cf. 1 GLOB. INV. & BUS. CTR., SAN MARINO: BUSINESS LAW HANDBOOK 8 (2012) (“The constitution of San Marino, enacted in 1600, is the world’s oldest constitution still in effect.”); DUNCAN WATTS, BRITISH GOVERNMENT AND POLITICS: A COMPARATIVE GUIDE 26 (2d ed. 2012) (noting

many others,<sup>163</sup> would continue to speak of a “government of laws” in the years and decades to come.<sup>164</sup> The concept would show up in everything from newspaper articles<sup>165</sup> to grand jury instructions delivered by U.S. Supreme Court Chief Justice John Jay,<sup>166</sup> the second

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“constitution of San Marino” was “enacted in 1600, but its contents are distributed over a number of legislative instruments.”).

163. Philadelphia, PA. PACKET, Jan. 12, 1782, at 2 (expressing the concern that “the government of Pennsylvania” would be reduced “from being a government of laws, to a government of men”); Mr. Printer, FREEMAN’S J.: OR, NORTH-AM. INTELLIGENCER, Feb. 26, 1783, at 2 (“Remember our’s is a government of laws not of men”); *For the Pennsylvania Packet*, PA. PACKET, Apr. 6, 1786, at 2 (“It is a distinguishing mark of a free government, that the people shall know before had the penalty of every offence, and therefore such a system is called a government of laws and not of men . . .”); *Philadelphia, September 23*, PA. GAZETTE, Sept. 23, 1789, at 3 (“With hearts expanded beyond the limits of our own country, we most ardently hope that the influence of this *novel*, but *bright, example* may be extended, till freedom, under governments of *laws*, not of *men*, shall bless the oppressed of every climate and country.”); *William Paterson, Answer*, GEN. ADVERTISER & POL., COM., AGRIC. & LITERARY J., Nov. 12, 1790, at 3 (“We live under a government of laws and not of men; it has freedom for its basis, and the happiness of the people for its object.”).

164. John Adams, TO THE GRAND JURY OF MORRIS COUNTY, IN NEW JERSEY 3 APRIL 1799, in 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 231 (Charles Francis Adams, ed. 1854) (“That the laws must be obeyed in a government of laws, is an all important lesson. For what can be more destructive of liberty and property than government without law, whether in one, few, or many?”); *New-York, April 22, 1789*, PHILA. INQUIRER, Apr. 22, 1789, at 3 (noting that John Adams, the Vice President of the United States, “addressed the Senate to the following purport”: “It is with satisfaction, that I congratulate the people of America on the formation of a National Constitution, and the fair prospect of a consistent administration of a government of laws.”); see also JOHN RAWLS, A THEORY OF JUSTICE 207, 207-10 (rev. ed. 1999) (“the rule of law is obviously closely related to liberty,” “one legal order is more justly administered than another if it more perfectly fulfills the precepts of the rule of law,” “the rule of law requires some form of due process,” and “[t]he rule of law also implies the precept that similar cases be treated similarly”).

165. *E.g.*, PHILA. INQUIRER, Dec. 31, 1791, at 3 (“There is no liberty without government—and surely there is no government where men govern the laws . . . With so much good sense as our countrymen are known to possess; and after so much as they have done and suffered to establish an equal government, by laws and not by men, it is impossible to conceive that any men, unless in a fit of mad passion, can be found so wicked and foolish as to fly in the fact of authority, and to oppose those very laws which they, by their representatives, have had part in framing.”).

166. *Eastern Circuit Court – The Charge of Chief Justice Jay, to the Grand Juries on the Eastern Circuit*, PA. PACKET, June 15, 1790, at 3 (“It cannot be too strongly impressed on the minds of us all, how greatly our individual prosperity depends on our national prosperity; and how greatly our national prosperity depends on a well organized, vigorous government, ruling by wise and equal laws, faithfully executed, nor is such a government unfriendly to liberty—to that liberty which is really inestimable. On the contrary, nothing but a strong government of laws, irrefutably bearing down arbitrary power and licentiousness, can defend it against those two formidable enemies. Let it be remembered, that civil liberty consists, not in a right to every man to do just what he pleases—but it consists in equal right to all the citizens to have, enjoy, and to do in peace, security, and without molestation, whatever the equal and constitutional laws of the country admit, to be consistent with the public good. It is the duty and the interest, therefore of all good citizens, in their several stations to support the laws and government, which thus protect their rights and liberties.”).

governor of New York, a former U.S. Secretary of Foreign Affairs, and the author of some of *The Federalist Papers*.<sup>167</sup>

The Massachusetts Constitution of 1780 contains a detailed declaration of rights and lays out the framework for the separation of powers between the legislative, executive and judicial branches. Among other things, its declaration of rights recites that “[a]ll men are born free and equal, have certain natural, essential, and unalienable rights”; “[t]he people of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent State”; “Government is instituted for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interest of any one man, family, or class men”; “[a]ll elections ought to be free”; “[e]very individual . . . has a right to be protected . . . in the enjoyment of his life, liberty, and property, according to standing laws”; “[e]very subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character”; “[h]e ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws”; and “[l]aws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government.”<sup>168</sup> Article XXIX of the Massachusetts Constitution of 1780 further declared:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit.<sup>169</sup>

#### V. FROM THE ENLIGHTENMENT TO MODERN CONCEPTIONS OF THE RULE OF LAW

The Enlightenment—and prominent writers of that era, from Montesquieu and Rousseau to Beccaria and Voltaire to Olympe de Gouges and Mary Wollstonecraft—ushered in a new way of thinking

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167. See generally *THE FEDERALIST* (Alexander Hamilton, James Madison & John Jay) (the *Federalist Papers*, serialized in New York newspapers between October 1787 and August 1788, and published in book form as *The Federalist*, were prepared by Alexander Hamilton, James Madison and John Jay and appeared under the pseudonym “Publius”).

168. MASS. CONST., pt. 1, arts. I, IV, VII, IX, X, XI, XXIV (1780).

169. *Id.*, pt. 1, art. XXIX.

about the Rule of Law and human rights.<sup>170</sup> The seventeenth-century's Glorious Revolution of 1688-89,<sup>171</sup> in which King James II was forced to abdicate the throne, led to the English Bill of Rights (1689),<sup>172</sup> which, in turn, served as a model for the Virginia Declaration of Rights (1776),<sup>173</sup> other early American declarations of rights and state

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170. See, e.g., M. A. THOMAS, GOVERN LIKE US: U.S. EXPECTATIONS OF POOR COUNTRIES 25-26 (2015) ("The Enlightenment was an intellectual revolution in Western Europe during the seventeenth and eighteenth centuries, as the modern nation-state was forming . . . . A literate urban elite challenged the absolutism of the monarchy and the authority of the church, revived the diffused ancient Greek and Roman political ideas, embraced science and rationality, questioned the foundations of the political and social order, and argued for equality, including women's rights, the abolition of slavery, and freedom of speech and thought. The idea that kings were divinely ordained, answerable only to God, was gradually overturned in favor of republican ideals in which the people are sovereign and delegate power to the government to be used for their own benefit.'"); see also *id.* at 34 ("What were daring arguments during the Enlightenment are for us today nonnegotiable articles of faith. The conflict that followed the Enlightenment left us with absolute moral convictions about human rights, the proper nature of government, and the proper use of governmental power. If we feel passionately about these notions of governance perhaps it is because a price was paid in blood to replace the older strategies of government, which were rejected and condemned. We represent the winning side. We are the inheritors of the victors of the political struggles of the Enlightenment."); DORINDA OUTRAM, PANORAMA OF THE ENLIGHTENMENT 24 (2006) (noting the difficulty of pinning down "a beginning date" for the Enlightenment, pointing out that the "image of the sun was the favourite metaphor of the Enlightenment," and observing: "'Enlightenment' was a word of power in the eighteenth century, but two people placed in the same room would have produced three opinions about what it actually meant. There was never a stable, universally accepted definition of 'Enlightenment' during the Enlightenment. Even the word itself varied from one region to another. A man in Paris would have spoken of *les lumières*, in Berlin of *Aufklärung*, in Milan of *illuminismo*.").

171. See generally PINCUS, *supra* note 138; see also RICHARD S. KAY, THE GLORIOUS REVOLUTION AND THE CONTINUITY OF LAW 131 (2014) (noting that William and Mary, who replaced James II, took an oath to rule "according to the statutes in parliament agreed on and the laws and customs of the same").

172. Bessler, *A Century in the Making*, *supra* note 136, at 996-97.

173. THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 13 (Patrick T. Conley & John P. Kaminski eds., 1992) (discussing how the Virginia Declaration of Rights, drafted by George Mason, was influenced by English principles laid down in the Magna Charta, the Petition of Right, the Commonwealth Parliament and the English Bill of Rights that followed the Glorious Revolution of 1688).

constitutions,<sup>174</sup> and the U.S. Bill of Rights (1791).<sup>175</sup> The revolutionary state constitutions guaranteed a host of individual rights, including in the arenas of public affairs and the criminal law,<sup>176</sup> with the U.S. Constitution's Bill of Rights doing the same after its ratification.<sup>177</sup> "[T]he American Revolution was creative and significant," Pulitzer Prize-winning historian Gordon Wood has written, "because of the revolutionary state constitutions that preceded the Constitution by more than a decade."<sup>178</sup> "Not only did the formation of the new state constitutions in 1776," he observed in 1993, "establish the basic structures of our political institution, their creation also brought forth the primacy conceptions of America's political and constitutional culture that have persisted to the present."<sup>179</sup>

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174. 8 *Papers of John Adams*, <http://www.masshist.org/publications/adams-papers/index.php/view/ADMS-06-08-02-0161-0001> (last visited Feb. 19, 2021) (editorial note) ("Of the eleven states that adopted constitutions during the Revolutionary period, Massachusetts, ratifying its document in 1780, was the last."; "Formal bills of rights had been written for the constitutions of five of the original states in 1776—Virginia, Pennsylvania, Delaware, Maryland, and North Carolina—and for Vermont in 1777, and several states without such formal bills included similar rights in their descriptions of governmental agents and their powers."); JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION* xvii (2013) ("State constitutions generally and North Carolina's constitution in particular are rich sources of fundamental principles of democratic government and guarantees of individual liberties. The North Carolina Constitution begins with a Declaration of Rights, which comprises thirty-six sections of Article I. Some of these provisions have origins in the Magna Carta; others, in the 1689 English Bill of Rights.").

175. *THE BILL OF RIGHTS AND THE STATES*, *supra* note 173, at 13-15; *see also* BESSLER, *CRUEL AND UNUSUAL*, *supra* note 137, at 11-16 (discussing the history of the "cruel and unusual punishments" prohibition, and its inclusion in the English Bill of Rights and American constitutions).

176. H. LOWELL BROWN, *THE AMERICAN CONSTITUTIONAL TRADITION: COLONIAL CHARTERS, COVENANTS, AND REVOLUTIONARY STATE CONSTITUTIONS, 1578-1780*, at 143-210 (2017) (discussing the American Revolution and the revolutionary state constitutions); William S. Price, Jr., *North Carolina: 'There Ought to Be a Bill of Rights'*, in *THE BILL OF RIGHTS AND THE STATES*, *supra* note 173, at 431 ("A deep suspicion of government led to the inclusion of bills of rights as part of or in conjunction with many state constitutions.").

177. 1 *ENCYCLOPEDIA OF JOURNALISM* 1475 (Christopher H. Sterling ed., 2009) ("The Bill of Rights, the first ten amendments to the Constitution of the United States, established a collection of basic human prerogatives on a federal level that mirrored many of the rights already guaranteed by individual states."); *see also* AMAR, *supra* note 118, at 8 ("The First Congress proposed a Bill of Rights that contained twelve amendments, but only the last ten were ratified by the requisite three-fourths of state legislatures in 1791, thereby becoming 'valid to all Intents and Purposes, as Part of [the] Constitution.'").

178. Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 *RUTGERS L.J.* 911, 911 (1993).

179. *Id.*; ("The office of our governors, the bicameral legislatures, tripartite separation of powers, bills of rights, and the unique use of constitutional conventions were all born during the state constitution-making period between 1775 and the early 1780s, well before the federal constitution of 1787 was created. In fact, the structure and form of the new federal government of 1787 was the direct product of what had taken place in the making of the state governments during the previous decade. In the first crucial years of independence, the states, not the federal government, were the focus of interest for most Americans.").

Because they lived more than 200 years ago, Enlightenment-era figures were not necessarily enlightened by modern standards, with a number of America's own founders actually buying and selling and enslaving human beings throughout their lives,<sup>180</sup> a total affront to the modern-day conception of the Rule of Law.<sup>181</sup> But Enlightenment thinkers did wrestle, in their own time and in their own ways, with critically important subjects such as how to frame and organize a government to prevent abuses of power—and how to protect individual rights (at least in ways that they, then, thought of human rights and the social compact). The Enlightenment—also known as the Age of Reason—has been variously defined as the eighteenth-century

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180. MARIE JENKINS SCHWARTZ, *TIES THAT BOUND: FOUNDING FIRST LADIES AND SLAVES* 61 (2017) (noting that George Washington “took deliberate steps to increase his slaveholding” when he “purchased thirteen slaves in 1759” and “bought ten more” two years later, with Washington continuing “to purchase slaves with some regularity until 1772”); *id.* at 63 (noting that George Washington tried to “deter runaways” and sold enslaved persons, including for transport to Maryland and the West Indies, who “proved recalcitrant” or attempted to escape human bondage); *see also* HENRY WIENCEK, *MASTER OF THE MOUNTAIN: THOMAS JEFFERSON AND HIS SLAVES* (2012) (discussing Thomas Jefferson’s views on slavery); *see also* Stephen E. Ambrose, *Founding Fathers and Slaveholders*, *SMITHSONIAN MAG.* (Nov. 2002), <https://www.smithsonianmag.com/history/founding-fathers-and-slaveholders-72262393/> (discussing the views of George Washington and Thomas Jefferson on slavery).

181. *See, e.g.*, HIRSCHFELD, *supra* note 154, at 1 (“Until he left Mount Vernon in the spring of 1775, at the age of forty-three, to take command of the Continental army at Cambridge, Massachusetts, Washington had shown few visible qualms about the institution of slavery. Not only did he and his wife own numerous slaves, but he bought and sold them and conformed in most respects with the slaveholding practices of his period and region.”); PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* ix, 210 (3d ed. 2014) (noting that Thomas Jefferson, of Virginia, “owned more than 150 slaves” when he wrote the Declaration of Independence and observing that “it is clear that Jefferson was not seriously interested in either allowing for private manumission or ending slavery” and “was far more concerned with ridding the state of free blacks and creating a criminal code to keep slaves in line”); DAVID O. STEWART, *MADISON’S GIFT* 311 (2015) (“When a slave owned by his father ran off, Madison bought an advertisement in a Richmond newspaper offering a reward for his return. When a mentor, Edmund Pendleton, asked for help in retrieving a runaway, Madison investigated Pennsylvania law on runaways, then asked a French diplomat to help recover the man from French troops. In instructions for his overseer and ‘laborers’ (one of many euphemisms employed by slaveowners), Madison directed that the slaves be treated humanely, ‘consistent with their necessary subordination and work.’”).



philosophy<sup>182</sup> “emphasizing reason and individualism over tradition”<sup>183</sup> and “rational scientific inquiry, humanitarian tolerance, and the idea of universal human rights”;<sup>184</sup> as “the search for ‘freedom’ and ‘progress’ achieved by a critical use of reason to change man’s relationship with himself and society”;<sup>185</sup> and as “a period during which superstition and ignorance receded in the face of an evolving body of scientific knowledge that gave order and harmony to a universe that could now be explained in the light of reason and rules.”<sup>186</sup> America’s “Framers and Founders,” it has been noted, “were the products of that period, and for many of them science and scientific ways of thinking were defining characteristics.”<sup>187</sup>

The figures of the Enlightenment were oftentimes deeply flawed, even resorting to extreme violence and brutality against enslaved persons.<sup>188</sup> Their ideas on topics such as the division of powers and the importance of an independent judiciary, though, continue to shape the

182. ANTHONY PAGDEN, *THE ENLIGHTENMENT AND WHY IT STILL MATTERS* 9 (2013) (“The modern use of the term ‘the Enlightenment’ . . . suggests a discrete moment in time—the ‘long’ eighteenth century, as it is sometimes called—marked off by the quite distinct intellectual concerns we associate with the nineteenth century, and above all with Romanticism.”); *cf. id.* at 5-6 (“The struggle over the identity of the Enlightenment was also a part of the Enlightenment itself. In December 1783 the *Berlinische Monatsschrift*, a widely read and generally progressive journal, published an article by a theologian and educational reformer named Johann Friedrich Zöllner. . . . [I]t might have passed unnoticed, and probably unread, if it had not been for a single footnote. ‘What is enlightenment?’ Zöllner asked. ‘This question, which is almost as important as what is truth, should indeed be answered before one begins enlightening. And still I have never found it answered!’ It was perhaps the most significant footnote in the entire history of western thought—and certainly the most widely discussed.”).

183. Shubha Ghosh, *Enlightening Identity and Copyright*, 49 *BUFF. L. REV.* 1315, 1315 (2001) (quoting the definition from the *Oxford English Dictionary*).

184. Calvin Massey, *The Constitution in a Postmodern Age*, 64 *WASH. & LEE L. REV.* 165, 169 n.12 (2007).

185. DORINDA OUTRAM, *THE ENLIGHTENMENT* 4 (1995).

186. Mark R. Killenbeck, *The Physics of Federalism*, 51 *U. KAN. L. REV.* 1, 41 (2002).

187. *Id.* at 41-42. The American Philosophical Society, founded in 1743 by Benjamin Franklin, was dedicated to the pursuit of “useful knowledge.”

188. In Virginia, for example, “[s]tocks, pillories, whipping posts, and gallows were constructed of wood with a few pieces of ironwork to secure braces, crossbars, and locks and to constrain individuals.” CARL R. LOUNSBURY, *THE COURTHOUSES OF EARLY VIRGINIA: AN ARCHITECTURAL HISTORY* 225 (2005); *see also id.* at 221 (“Accused slaves enjoyed few rights and rarely had a sympathetic ear from the presiding justices, who were not their peers but often masters, owners of other slaves who had an inherent interest in preserving their subservience.”); *id.* (“[W]hen slaves were convicted of murdering their masters, mere hanging was not enough. Peter, a slave in Orange County, pleaded guilty in 1737 to murdering his master, John Riddle. The justices ordered that he be hanged at the next court day between the hours of ten and noon; his head was then to be cut off and stuck ‘on a pole near the courthouse to deter others from doing the like.’ The brutality of the punishment reflected slave owners’ fear of losing control over their servile labor force, which in some counties amounted to more than half the population by the late colonial period.”).

modern world.<sup>189</sup> James Madison, the Virginia slave owner who played a major role in the drafting of the U.S. Constitution and its Bill of Rights,<sup>190</sup> called Montesquieu—the French jurist who protested against torture<sup>191</sup> but who nonetheless approved torturous punishments as part of his work within France’s civil law system<sup>192</sup>—“[t]he oracle who is always consulted and cited” on separation of powers.<sup>193</sup> Jean-Jacques Rousseau, the Genevan philosopher, gained much celebrity for writing about the social contract,<sup>194</sup> although his conception of equality did not include equal rights for women.<sup>195</sup> Beccaria—an aristocrat from Milan

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189. SCOTT L. MONTGOMERY & DANIEL CHIROT, *THE SHAPE OF THE NEW: FOUR BIG IDEAS AND HOW THEY MADE THE MODERN WORLD* 6 (2015) (“The Enlightenment was a critical period for the birth of modernity, an era of deep separation from all that had gone before, a period of enormous creativity and destruction, most of all in the realm of thought.”).

190. MARY SARAH BILDER, *MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 10 (2015) (noting that James Madison has been called the “Father of the Constitution” and describing his role in the U.S. Bill of Rights).

191. CHARLES DE SECONDAT BARON DE MONTESQUIEU, *MONTESQUIEU’S SCIENCE OF POLITICS: ESSAY ON THE SPIRIT OF LAWS* 309 (David W. Carrithers, Michael A. Mosher & Paul A. Rahe eds., 2001) (“Montesquieu’s protest against the use of legal torture in criminal trials is contained in Book VI, chapter 17 of *The Spirit of Laws*. His comments are quite brief. Rather than engaging in an extended argument against the use of legal torture, he simply suggests that so many others have spoken eloquently on the subject that extended commentary is not required. There can be no mistaking his strong opinion however. ‘The voice of nature,’ he asserts, ‘cries out against the use of legal torture even in despotic governments.’”).

192. *THE ENLIGHTENMENT: A SOURCEBOOK AND READER* 212 (Paul Hyland, Olga Gomez & Francesca Greensides eds., 2003) (noting that, even though as a judge, Montesquieu “must have authorised the torture and execution of many people, he evidently believed that the innocent needed to be protected, that torture was cruel and useless, and that the death penalty was used far too freely.”).

193. MELVYN RICHTER, *THE POLITICAL THEORY OF MONTESQUIEU* 3 (1977). John Adams, in the Massachusetts Constitution of 1780, clearly connected the Rule of Law concept with separation of powers. See MASS CONST. art. of 1780 XXX, [https://press-pubs.uchicago.edu/founders/documents/bill\\_of\\_rightss6.html](https://press-pubs.uchicago.edu/founders/documents/bill_of_rightss6.html) (“In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”); see also Donald B. Verrilli, Jr., *The Rule of Law: More Than Just a Law of Rules*, 97 NEB. L. REV. 925, 930 (2019) (“When we talk about the rule of law, what we mean above all is that, in the words of the Massachusetts Constitution written by John Adams, we are a government of laws and not men.”); William N. Drake, Jr., *The Common Law and the Rule of Law: An “Uncomfortable Relationship”*, 45 STETSON L. REV. 439, 461 (2016) (“The phrase ‘the rule of law’ implies that no one is above the law but that everyone is subject to it, a popular concept in revolutionary times. John Adams is credited with enshrining the rule of law in the Massachusetts Constitution.”).

194. See generally JEAN-JACQUE ROUSSEAU, *ROUSSEAU: THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* (Victor Gourevitch ed., 2003).

195. JEAN-JACQUES ROUSSEAU, *ROUSSEAU ON WOMEN, LOVE, AND FAMILY* xiv (Christopher Kelly & Eve Grace eds., 2009) (“Rousseau’s failure to demand the same equality and freedom for women as he does for men is in striking contrast to a number of his predecessors and contemporaries, who carried the torch of Enlightenment into this sphere as

who, in his mid-20s, wrote about the dividing line between liberty and tyranny<sup>196</sup> and explored the contours and subject of the criminal law—advocated for proportionate punishments, a scale of crimes and punishments, and the abolition of both torture and the death penalty<sup>197</sup> even though his publicly offered alternative to executions—“perpetual slavery”<sup>198</sup>—is one rightfully shunned by modern-day lawmakers.<sup>199</sup> Voltaire, Jefferson, Madison and others championed freedom of expression, religious toleration, and a separation of church and state,<sup>200</sup>

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well, arguing that women should be emancipated from the legal and social restrictions that were imposed upon them.”); *see also* JONATHAN I. ISRAEL, *THE ENLIGHTENMENT THAT FAILED: IDEAS, REVOLUTION, AND DEMOCRATIC DEFEAT, 1748-1830*, at 331 (2019) (noting Rousseau’s views on women and contrasting them with those of Diderot and Condorcet).

196. For example, Beccaria repeated the maxim laid down by Montesquieu that any punishment that is not necessary is “tyrannical.” *See generally* JOHN D. BESSLER, *THE BARON AND THE MARQUIS: LIBERTY, TYRANNY, AND THE ENLIGHTENMENT MAXIM THAT CAN REMAKE AMERICAN CRIMINAL JUSTICE* (2019) (tracing the history of that maxim from the Enlightenment to the present).

197. *See generally* JOHN D. BESSLER, *THE CELEBRATED MARQUIS: AN ITALIAN NOBLE AND THE MAKING OF THE MODERN WORLD* (2018); JOHN D. BESSLER, *THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION* (2014).

198. *See, e.g.*, PETER GARNSEY, *AGAINST THE DEATH PENALTY: WRITINGS FROM THE FIRST ABOLITIONISTS—GIUSEPPE PELLI AND CESARE BECCARIA 105-06* (2020) (discussing Beccaria’s view that, for the most serious offenses, the punishment he sought was “perpetual slavery (*schiavitù perpetua*),” with Beccaria also envisaging slavery for shorter periods (*schiavitù per un tempo*) for lesser offenses); *see also* BARBARA ESPOSITO & LEE WOOD, *PRISON SLAVERY* 37 (Kathryn Bardsley ed., 1982). Notably, the U.S. Constitution’s Thirteenth Amendment reads: “Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST., amend. XIII (1865) (emphasis added).

199. *See, e.g.*, Alaa Elassar, *Minnesota’s constitution still allows slavery as a punishment for crimes. Now lawmakers are trying to change that*, CNN (Feb. 21, 2020, 12:05 pm), <https://www.cnn.com/2020/02/21/us/minnesota-remove-slavery-punishment-constitution-trnd/index.html> (noting that in multiple states slavery is “technically still a part” of their constitutions, but that Colorado “changed the language of their state’s constitution to abolish all forms of slavery in 2018,” and that efforts are underway to remove the reference to slavery in Minnesota’s constitution, with the 1857 Minnesota Constitution stating in part: “There shall be neither slavery nor involuntary servitude in the state otherwise than as punishment for a crime of which the party has been convicted.”).

200. *See generally* VOLTAIRE, *A TREATISE ON RELIGIOUS TOLERATION: OCCASIONED BY THE EXECUTION OF THE UNFORTUNATE JOHN CALAS; UNJUSTLY CONDEMNED AND BROKEN UPON THE WHEEL AT TOULOUFE, FOR THE SUPPOSED MURDER OF HIS OWN SON* (Eloisa Emilius trans., 1764); *see also* THOMAS KSELMAN, *CONSCIENCE AND CONVERSION: RELIGIOUS LIBERTY IN POST-REVOLUTIONARY FRANCE* 27 (2018) (“For Voltaire, religious liberty centered on the right of Protestants to worship publicly and to be protected against state violence, with individual freedom of conscience a prior but unexamined assumption.”); Lance Banning, *James Madison, the Statute for Religious Freedom, and the Crisis of Republican Convictions*, in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY* 109 (1988) (“The Virginia Statute for Religious Freedom was an early fruit of the most famous partnership in American political history. Thomas Jefferson prepared it, as part of the proposed revision of the code of laws that his Committee of Revisors reported to the General Assembly in 1779. James Madison secured

but sadly, slavery, overt gender discrimination, other forms of extreme prejudice, and virulent anti-Semitism stubbornly persisted.<sup>201</sup>

At a time when women were systematically denied the right to vote and to participate in public life (e.g., as lawyers, judges or jurors),<sup>202</sup> Mary Wollstonecraft—a talented English writer whose second daughter,

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its passage, six years later . . .”); MICHAEL I. MEYERSON, *LIBERTY’S BLUEPRINT: HOW MADISON AND HAMILTON WROTE THE FEDERALIST PAPERS, DEFINED THE CONSTITUTION, AND MADE DEMOCRACY SAFE FOR THE WORLD* 47 (2008) (noting the involvement of James Madison in the Bill for Establishing Religious Freedom); Michael P. Zuckert, *Thomas Jefferson and Natural Morality: Classical Moral Theory, Moral Sense, and Rights*, in THOMAS JEFFERSON, *THE CLASSICAL WORLD, AND EARLY AMERICA* 56 (Peter S. Onuf & Nicholas P. Cole eds., 2011) (“The centrality of the natural rights philosophy is perhaps most perspicuously captured in Jefferson’s list of the three great accomplishments for which he wished to be remembered: the Declaration of Independence, the Virginia Statute for Religious Freedom, and the University of Virginia. All three, for him, expressed or derived their importance from commitments to the rights of man.”). In his 1802 letter to the Danbury Baptists, Jefferson wrote:

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church & State.

Paul E. Kerry, *Religious and Secular Presuppositions in First Amendment Interpretations*, in *THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS LIBERTY* 254 (Michael D. Breidenbach & Owen Anderson eds., 2020).

201. E.g., Lyombe Eko, *New Medium, Old Free Speech Regimes: The Historical and Ideological Foundations of French & American Regulation of Bias-Motivated Speech and Symbolic Expression on the Internet*, 28 *LOY. L.A. INT’L & COMP. L. REV.* 69, 89 (2006) (“During the Renaissance in France, the rebirth of learning also saw a rebirth of anti-Semitism. Some philosophers like Voltaire, who championed human rights and freedom from the shackles of dogmatic religion, were often hostile towards Jews who refused to renounce their religion and culture, and worship at the altar of secularism, rationalism, and humanism.”); cf. PEREZ ZAGORIN, *HOW THE IDEA OF RELIGIOUS TOLERATION CAME TO THE WEST* 293 (2013) (“There were many noted advocates of toleration during the Enlightenment . . . . In France Montesquieu, Voltaire, Turgot, Diderot, Rousseau, Condorcet, and other prominent thinkers were in favor of tolerance and pluralism in religion. A great blot on the tolerant outlook of some of them, however, which must not be overlooked, was their anti-Semitism. One of these, unhappily, was Voltaire . . . .”). France’s Nicolas de Condorcet—a philosopher, scientist and mathematician—advocated for human rights such as free and equal education, including for women and people of all races. LISA MURPHY ET AL., *EDUCATION STUDIES: AN INTRODUCTION* 58 (2008); KENNETH ALLAN, *EXPLORATIONS IN CLASSICAL SOCIOLOGICAL THEORY: SEEING THE SOCIAL WORLD* 215 (3d ed. 2012).

202. See, e.g., LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 153 (1980) (noting that one of the features of the early “Anglo-American legal system” was that “the courtroom remained a male domain”); *id.* (“The exclusion of women from formal legal training meant that women were absent from the courtroom as attorneys, judges, or clerks. Because women were not thought to be political beings, they did not serve on juries; their absence meant that accused women did not receive a trial before their peers. Women were present in the courtroom only as plaintiffs, defendants, or witnesses—as recipients, rather than dispensers, of justice.”).

the novelist Mary Shelley, famously wrote *Frankenstein* (1818)—called for the education of women and gender equality in *A Vindication of the Rights of Woman* (1792).<sup>203</sup> Her French counterpart, Olympe de Gouges—a playwright executed by guillotine in 1793 during the French Revolution’s Reign of Terror<sup>204</sup>—published her own *Declaration of the Rights of Woman and the Female Citizen* (1791) shortly after France’s National Constituent Assembly issued its Declaration of the Rights of Man and the Citizen (1789).<sup>205</sup> “By moving from the masculine language of the ‘rights of men’ to a specifically feminine pronoun,” historian Eileen Hunt Botting writes, “Wollstonecraft underscored the special and urgent need for civic recognition of women’s human rights, especially to education.” “Using a similar rhetorical technique,” Botting observes, “de Gouges’s 1791 Parisian pamphlet ‘Declaration of the Rights of Woman and Citizen’ uncovered the patriarchal bias of the 1789 *Declaration*, by rewriting the list of French republican rights with the female sex included.”<sup>206</sup>

Words, with all their nuance of meaning, played a critical role in eighteenth-century debates and political discourse.<sup>207</sup> During the

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203. See generally MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN: WITH STRICTURES ON POLITICAL AND MORAL SUBJECTS* (3d ed. 1796); CHARLOTTE GORDON, *ROMANTIC OUTLAWS: THE EXTRAORDINARY LIVES OF MARY WOLLSTONECRAFT & MARY SHELLEY* (2015); see also KAREN O’BRIEN, *WOMEN AND ENLIGHTENMENT IN EIGHTEENTH-CENTURY BRITAIN* 199 (2009) (noting that Wollstonecraft “dedicated *A Vindication of the Rights of Woman* to the revolutionary cleric Charles Maurice de Talleyrand-Périgord, upbraiding him for not having urged fellow drafters of the Declaration of the Rights of Man to extend those rights to women.”); cf. JANET M. TODD, *MARY WOLLSTONECRAFT: AN ANNOTATED BIBLIOGRAPHY* ix (2013) (“In 1792, Mary Wollstonecraft published her *Vindication of the Rights of Woman*. Several eighteenth-century women before her, such as Mary Astell, ‘Sophia,’ and Catherine Macaulay, had written on women, their rights and their education, but Wollstonecraft fired a generation of women with her ideas in a way her predecessors had not. This was partly due to the time when she wrote, during the early part of the French Revolution, when many radical writers in England were discussing human rights and education, and so were preparing the public for Wollstonecraft’s feminist ideas.”).

204. BARRY RUBIN & JUDITH COLP RUBIN, *CHRONOLOGIES OF MODERN TERRORISM* 7 (2008) (noting that 1793 to 1794 was “[t]he period known as the Great Terror or Reign of Terror in France” and was “the first conscious and systematic use of such concepts as ‘terror,’ ‘terrorism,’ and ‘terrorists’”); Grace A. Green, *Olympe de Gouges: A Woman too Revolutionary for Revolution*, 9 *TENOR OF OUR TIMES* 136, 139, 152 (2020), <https://scholarworks.harding.edu/cgi/viewcontent.cgi?article=1154&context=tenor>.

205. See generally SOPHIE MOUSSET, *WOMEN’S RIGHTS AND THE FRENCH REVOLUTION: A BIOGRAPHY OF OLYMPE DE GOUGES* (Joy Poirer trans., 2007); see also GEORG JELLINEK, *THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS: A CONTRIBUTION TO MODERN CONSTITUTIONAL HISTORY* 1 (Max Farrand trans., 1901).

206. EILEEN HUNT BOTTING, *WOLLSTONECRAFT, MILL, AND WOMEN’S HUMAN RIGHTS* 43 (2016).

207. E.g., AVI LIFSCHITZ, *LANGUAGE AND ENLIGHTENMENT: THE BERLIN DEBATES OF THE EIGHTEENTH CENTURY* (2012); see also ELENA RUSSO, *STYLES OF ENLIGHTENMENT: TASTE, POLITICS, AND AUTHORSHIP IN EIGHTEENTH-CENTURY FRANCE* 99 (2007).

Enlightenment, the law's language, as expressed in bills of rights, constitutions and legal codes, came to be seen as an indispensable tool for protecting people's natural and human rights.<sup>208</sup> Clarity in drafting constitutions and laws came to be highly valued,<sup>209</sup> with lawmakers insisting—in what has come to be known as the principle of *legality*<sup>210</sup>—

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(“Diderot’s skepticism about the incongruity between linguistic meaning and use, his fear that language did not reflect reality but rather contributed to skewing its perception, was to resonate throughout the Enlightenment.”).

208. LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* 121 (2007) (“Even before Congress declared independence, the colonists called state conventions to replace British rule, sent instructions with their delegates to demand independence, and began drafting state constitutions that often included bills of rights. The Virginia Declaration of Rights of June 12, 1776, proclaimed that ‘all men are by nature equally free and independent and have certain inherent rights,’ which were defined as ‘the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.’”); *id.* at 122 (“Even in Great Britain, a more universalistic notion of rights began to creep into discourse in the 1760s. Talk of rights had quieted down with the restoration of stability after the 1688 revolution that had resulted in the Bill of Rights. The number of book titles that included some mention of ‘rights’ steadily declined in Britain from the early 1700s to the 1750s. As international discussion of natural law and natural rights intensified, the numbers then began to rise again in the 1760s and continued to grow thereafter. In a long pamphlet of 1768 denouncing aristocratic patronage of clerical positions in the Church of Scotland, the author called on both ‘the natural rights of mankind’ and ‘the natural and civil rights of FREE BRITONS.’”).

209. Michel Troper, *What Is Interpretation of the Law for the French Judge?*, in *INTERPRETATION OF LAW IN THE AGE OF ENLIGHTENMENT: FROM THE RULE OF THE KING TO THE RULE OF LAW* 141 (Yasutomo Morigiwa et al. eds., 2011) (“For the revolutionaries, clarity was an ideal that they wished to achieve for two main reasons. First, clarity was prized, as it was considered to be a prerequisite to the citizen’s freedom. If the law is clear, then everyone knows what the consequences of his actions will be. Thus, he will be able to proceed or refrain from acting. The second reason was the idea that the power to interpret a law amounts to the power to legislate.”); *see also* VINCENZO FERRONE, *THE POLITICS OF ENLIGHTENMENT: CONSTITUTIONALISM, REPUBLICANISM, AND THE RIGHTS OF MAN IN GAETANO FILANGIERI* 140-41 (Sophus A. Reinert trans., 2012) (noting that in his multi-volume work, *The Science of Legislation*, Gaetano Filangieri attempted to give “a complete and reasoned system of legislation” and to reduce the subject “to a safe and ordered science, uniting means to rules, theory to practice”); 5 *ENCYCLOPÆDIA AMERICANA: A POPULAR DICTIONARY OF ARTS, SCIENCES, LITERATURE, HISTORY, POLITICS AND BIOGRAPHY* 117 (1851) (discussing the influence of *La Scienza della Legislazione* (*The Science of Legislation*)).

210. Deena Mohammad El-Rashed, *Derogation in Time of Emergency: An Analysis of Counter-Terrorism Measures in France and Their Impact on Human Rights*, 30 *FLA. J. INT’L L.* 1, 10-11 (2018) (“The principle of legality is a reflection of the maxim of *nullum crimen sine lege*—no crime without law—and is a fundamental aspect of human rights law and the rule of law in general. Its absolute and non-derogable nature has been explicitly recognized by a number of human rights treaties and international human rights bodies. It is closely linked with the right to ‘security of person’ as it ‘safeguards people’s right to know which acts will result in criminal liability and which will not,’ thus protecting against an overreaching or arbitrary exercise of power on behalf of the state. The principle of legality demands that all limitations on rights and freedoms, particularly in the context of proscribing that which has been deemed a ‘criminal’ offense, be prescribed by law. Furthermore, it demands that any criminal conviction resultant of such law comply with the principles of non-retroactivity and

that citizens be given advance notice of the laws.<sup>211</sup> In *Dei delitti e delle pene* (1764), translated into French by economist and *philosophe* André Morellet and then into English as *An Essay on Crimes and Punishments* (1767),<sup>212</sup> Beccaria specifically took up the topics of lawmaking and interpretation of the laws.<sup>213</sup> “Where the laws are clear and precise,” Beccaria observed, “the judge’s task is merely to discover the facts.”<sup>214</sup>

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individual criminal responsibility. Together, these two components of the principle of legality provide for fair notice and fair adjudication in criminal law.”).

211. GABRIEL HALLEVY, A MODERN TREATISE ON THE PRINCIPLE OF LEGALITY IN CRIMINAL LAW 8 (2010) (“Despite the Latin maxim *nullum crimen sine lege* (there is no crime without a law), the origin of the principle of legality in its modern meaning is not in Roman law but in the age of Enlightenment in the eighteenth century.”); MARC RIBEIRO, LIMITING ARBITRARY POWER: THE VAGUENESS DOCTRINE IN CANADIAN CONSTITUTIONAL LAW 10 (2004) (noting that the *legality* principle “was first stated in a significant manner in Article 8 of the *French Declaration of the Rights of Man, 1789*: ‘no one may be punished except by virtue of a law established and promulgated before the crime and legally applied’ ”); 3 GIDEON BOAS ET AL., INTERNATIONAL CRIMINAL PROCEDURE 429 (2011) (“At the core of criminal law, both national and international, is the principle of legality—that is, the accused’s right not to be punished for an act that was not criminal when it was performed.”); Rupa Bhattacharyya, *Establishing a Rule-of-Law International Criminal Justice System*, 31 TEX. INT’L L. J. 57, 64 (1996) (“At the heart of a legal order predicated on the rule of law are the maxims of *nullum crimen sine lege* and *nulla poena sine lege*, that is, that there can be neither crime nor punishment unless there is a law that so declares.”); Brad R. Roth, *Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice*, 8 SANTA CLARA J. INT’L L. 231, 249 (2010) (“[N]ullum crimen sine lege lies at the core, rather than the periphery, of the rule of law. Criminal prosecutions are exercises of power not merely tolerated by law, but undertaken in the name of law.”).

212. Beccaria’s book was rapidly translated into English and an array of other languages. E.g., Rosamaria Loretelli, *The First English Translation of Cesare Beccaria’s On Crimes and Punishments: Uncovering the Editorial and Political Contexts*, 2 DICIOTTESIMO SECOLO 1 (2017); see also Rosamaria Loretelli & John Dunkley, *The Criminal Question in the Public Sphere. Cesare Beccaria’s On Crimes and Punishments and Eighteenth-Century Britain: A Two-Way Perspective*, 4 DICIOTTESIMO SECOLO 3, 4 (2019) (noting the translation of Beccaria’s book into French, Swedish, Spanish, German, Danish, and Greek). Beccaria’s book had a profound influence on American revolutionaries. See generally John D. Bessler, *The Italian Enlightenment and the American Revolution: Cesare Beccaria’s Forgotten Influence on American Law*, 37 MITCHELL HAMLINE L. J. PUB. POL’Y & PRAC. (2016), <https://digitalcommons.hamline.edu/cgi/viewcontent.cgi?article=1021&context=jplp>.

213. CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* (Aaron Thomas ed. & Jeremy Parzen trans., 2009) (translating chapter IV of Beccaria’s *On Crimes and Punishments*). In *On Crimes and Punishments*, Beccaria wrote: “Nothing could be more dangerous than following the popular maxim whereby it is the spirit of the law that must be consulted.” As Beccaria warned:

The spirit of the law would thus be the product of a judge’s good or bad logic, of his effortless or unhealthy digestion; it would depend upon the violence of his passions, upon the weaknesses he might suffer, on the judge’s relations with the plaintiff, and on all those minute factors that alter the appearance of an object in the fluctuating mind of man.

*Id.*

214. CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* 35 (Richard Bellamy, ed. & Richard Davies, trans. 2003).

Judges, he wrote, “should reason syllogistically” from a law’s text,<sup>215</sup> warning about the adverse implications of the “common axiom” that “*the spirit of the laws is to be considered*.”<sup>216</sup> In an era still peppered with capital and corporal punishments and sentences of exile, slavery or “penal servitude” for life,<sup>217</sup> Beccaria emphasized: “it is the greatest of evils if the laws be written in a language which is not understood by the people and which makes them dependent upon a few individuals because they cannot judge for themselves what will become of their freedom or their life and limbs.”<sup>218</sup>

In his own time, Beccaria was celebrated as the first Enlightenment writer to make a comprehensive case against capital punishment,<sup>219</sup> and his book was read and cited by an array of European and American lawmakers.<sup>220</sup> “The more people understand the sacred code of the laws

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215. Bernard E. Harcourt, *Beccaria’s On Crimes and Punishments: A Mirror on the History of the Foundations of Modern Criminal Law*, in FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW (Markus D. Dubber ed., 2014), ch. 2, § 3.f (“Beccaria was wedded to the rule of law and advocated strongly in favor of judging by syllogism. ‘The judge should construct a perfect syllogism about every criminal case,’ Beccaria emphasized; ‘the major premise should be the general law; the minor, the conformity or otherwise of the action with the law; and the conclusion, freedom or punishment.’”).

216. BESSLER, THE CELEBRATED MARQUIS, *supra* note 197, at 186-87.

217. See generally John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 BRIT. J. AM. LEGAL STUD. 297 (2013) (discussing the prevalence of non-lethal corporal punishments in prior ages and documenting their abolition or abandonment, and noting the anomaly of the law continuing to permit lethal, state-sanctioned executions in the modern era); CAPTIVATING SUBJECTS: WRITING CONFINEMENT, CITIZENSHIP, AND NATIONHOOD IN THE NINETEENTH CENTURY 8 (Jason Haslam & Julia M. Wright, eds., 2005) (noting that “[p]enal servitude” was “significant in British carceral practice in the eighteenth and nineteenth centuries” and pointing out that even the U.S. Constitution’s Thirteenth Amendment, which abolished slavery and involuntary servitude, provided “a loophole for the use of slavery”).

218. BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 197, at 55. In 2005, at his U.S. Senate Judiciary Committee confirmation hearing, now-Chief Justice John Robert famously called judges “umpires” who “don’t make the rules; they apply them.” “I will remember that it’s my job to call balls and strikes and not to pitch or bat.” MARK TUSHNET, IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT ix (2013).

219. WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 5 (3d ed. 2002) (“The modern abolitionist movement establishes its paternity with the great Italian criminologist, Cesare Beccaria. His work . . . convinced such statesmen as Voltaire, Jefferson, Paine, Lafayette and Robespierre of the uselessness and inhumanity of capital punishment and even led to ephemeral measures abolishing the death penalty in Austria and Tuscany.”). Another Italian aristocrat, Giuseppe Pelli of Florence, wrote a critique of the death penalty three years before Beccaria’s *On Crimes and Punishments* first appeared, but it was lost for more than two centuries in the Pelli family archives and only translated into English for the first time in 2020. AGAINST THE DEATH PENALTY: WRITINGS FROM THE FIRST ABOLITIONISTS—GIUSEPPE PELLI AND CESARE BECCARIA 3-5 (Peter Garnsey trans., 2020).

220. In 1770, a few years before Americans declared their independence, John Adams effectively quoted from Cesare Beccaria’s book at the Boston Massacre trial in his defense of



and get used to handling it, the fewer will be the crimes,” Beccaria observed.<sup>221</sup> With the fourth chapter of Beccaria’s *On Crimes and Punishments* devoted to the interpretation of the laws, one modern translator of the book observes that the whole chapter was “a reaction against the unbridled judicial discretion characteristic of Beccaria’s day.”<sup>222</sup> The English physician and philosopher John Locke had, in his own time, warned against “arbitrary power” and “[a]bsolute arbitrary power, of governing without *settled standing laws*,” contending that “[t]he *liberty of man*, in society, is to be under no other legislative power, but that established, by consent, in the common-wealth.”<sup>223</sup> “*Wherever law ends, tyranny begins*,” Locke wrote.<sup>224</sup> Beccaria, like Locke and others, opposed tyrannical practices, and America’s founders similarly railed against arbitrary government,<sup>225</sup> embracing the use of written constitutions to protect delineated rights.<sup>226</sup> In addition to *On Crimes and Punishments*, Beccaria also published *Ricerche intorno alla natura*

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British soldiers charged with murder. “May it please your Honors, and you, Gentlemen of the Jury,” he said,

I am for the prisoners at the bar, and shall apologize for it only in the words of Marquis Beccaria: ‘If I can be but the instrument of preserving one life, his blessing and tears of transport shall be a sufficient consolation to me for the contempt of all mankind.’

71 THE NORTH AMERICAN REVIEW 407, 440 (Oct. 1850) (reviewing 2 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES, AND ILLUSTRATIONS (Charles Francis Adams ed., 1850)).

221. BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 197, at 55.

222. *Id.*

223. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT xx, 17, 70, 72 (C. B. Macpherson ed., 1980) (the Second Treatise of Government was originally published in 1690).

224. JOHN LOCKE, TWO TREATISES ON GOVERNMENT 362 (John Bumpus 1821).

225. The Declaration of Independence itself observed that “the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States,” with one of its recitals that followed emphasizing:

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies . . . .

DECLARATION OF INDEPENDENCE (U.S. 1776), <https://www.archives.gov/founding-docs/declaration-transcript>.

226. SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828, at 271 (1999) (“Written constitutions and bills of rights . . . served multiple functions within a republican polity. These texts not only were ‘intended to give law, and assign limits to a government,’ but also instructed the people so that ‘by reducing speculative truths to fundamental laws, every man of the meanest capacity and understanding may learn his own rights, and know when they are violated.’ . . . Constitutional texts had to be crafted in clear, precise language. When properly drafted, written constitutions served as important checks and instilled republican values in the people. By linking a culture of constitutionalism to the public sphere itself, written constitutions provided a powerful check against government tyranny. A culture of constitutionalism would create an active citizenry who would sound the alarm at the first threat to their liberty.”).

*dello stile* (*Research on the Nature of Style*, 1770), which itself focused on the use and nuance of language.<sup>227</sup>

Beccaria's writings—on tyranny, the need for penal reform, and interpretation of the laws—had a major influence throughout Europe and the Americas.<sup>228</sup> For example, Thomas Jefferson expressed the view, in line with Beccaria's, that punishments should be "proportionate" and "mild" and that judges, in doing their work, should closely adhere to the text of laws as written by legislators.<sup>229</sup> As Jefferson once said: "Let mercy be the character of the law-giver, but let the judge be a mere machine."<sup>230</sup> Jefferson copied multiple passages from Beccaria's *On Crimes and Punishments* into his commonplace book in the original Italian,<sup>231</sup> taking note of Beccaria's cautionary warning about judicial discretion: "*si apre la porta all'incertezza*," the door is opened to uncertainty.<sup>232</sup> As Beccaria, wanting more certainty and less severity and discretion in the law's application, himself wrote:

Each man has his point of view, each man in different times has a different one. The spirit of the law would thus be the result of good, or wicked logic of a judge of an easy, or indisposed digestion; it

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227. CASSELL DICTIONARY OF ITALIAN LITERATURE 38-39 (Peter Bondanella & Julia Conaway Bondanella eds., 2d ed. 1996). The Enlightenment also saw the publication of a number of dictionaries. See generally PETER MARTIN, *THE DICTIONARY WARS: THE AMERICAN FIGHT OVER THE ENGLISH LANGUAGE* (2019).

228. See generally John D. Bessler, *The Marquis Beccaria: An Italian Penal Reformer's Meteoric Rise in the British Isles in the Transatlantic Republic of Letters*, 4 *DICIOTTESIMO SECOLO* 107 (2019); see also John D. Bessler, *The Economist and the Enlightenment: How Cesare Beccaria Changed Western Civilization*, 46 *EUR. J. L. & ECON.* 275 (2018).

229. JEFFERSON: POLITICAL WRITINGS 337 (Joyce Appleby & Terence Ball eds., 1999).

230. *Id.*

231. America's founders were fascinated by Italian culture, and there were many connections between American and Italian thinkers. See, e.g., BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 197 (describing in detail the influence of the Italian Enlightenment on the American Revolution); see generally RALPH G. GIORDANO, *ITALIAN CULTURE IN AMERICA: HOW A FOUNDING FATHER INTRODUCED ITALIAN ART, ARCHITECTURE, FOOD, WINE, AND LIBERTY TO THE AMERICAN PEOPLE* (2020); *THE ITALIAN AMERICAN EXPERIENCE: AN ENCYCLOPEDIA* 305 (Salvatore J. LaGumina et al. eds., 2000) ("Perhaps the most famous American with a formidable knowledge of Italian was Benjamin Franklin, who studied the language in 1733 and who seemed to enjoy speaking it with other colonists . . . . The study of Italian, beginning in the mid-eighteenth century, was also influenced by noted Italophiles, among them Thomas Jefferson, John Adams, John Quincy Adams, Ralph Waldo Emerson, Nathaniel Hawthorne, William Prescott, George Bancroft, Margaret Fuller, Harriet Beecher Stowe, Julia Ward Howe, Washington Irving, William Cullen Bryant, and Edgar Allan Poe."). For an Italian language source, see BARBARA FAEDDA, *ÉLITE: CULTURA ITALIANA E STATUNITENSE TRA SETTECENTO E NOVECENTO* (2020).

232. JEFFERSON'S LEGAL COMMONPLACE BOOK 491 (David Thomas Konig & Michael P. Zuckert, eds. 2019); *THE MANY LEGALITIES OF EARLY AMERICA* 116 (Christopher L. Tomlins & Bruce H. Mann, eds. 2001).

would depend on the violence of his passions, of the infirmity of which he suffers.<sup>233</sup>

In a passage of Beccaria's book that John Adams would copy by hand from the original Italian text, Beccaria had observed of the impulse that led to so many abuses of power: "*Ogni uomo si fa centro di tutte le combinazioni del globo.*" The translation: "Every man makes himself the center of his whole world."<sup>234</sup>

In accord with the notion that people must be given notice of a penal law before its application, the U.S. Constitution expressly abolished *ex post facto* laws—laws passed after the commission of an act that retrospectively changed its legal consequences.<sup>235</sup> The Constitution also explicitly outlawed *bills of attainder*, legislative acts whereby one or more persons were declared to be *attainted*, to have their property confiscated, and to be sentenced to death without a judicial trial.<sup>236</sup> In *The Federalist No. 44*, signed "Publius," James Madison wrote:

Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted.<sup>237</sup>

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233. David Thomas Konig, *Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common-Law Adjudication*, in *THE MANY LEGALITIES OF EARLY AMERICA* 116 (Christopher L. Tomlins & Bruce H. Mann eds., 2001).

234. *THE POLITICAL WRITINGS OF JOHN ADAMS* 159 n.19 (George W. Carey ed., 2001).

235. HENRY CAMPBELL BLACK, *A LAW DICTIONARY CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN* 453 (2d ed. 1995).

236. 1 JOHN BOUVIER, *A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF THE SEVERAL STATES OF THE AMERICAN UNION; WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW* 127 (1839); *MERRIAM-WEBSTER'S DICTIONARY OF LAW: YOUR EASY-TO-UNDERSTAND GUIDE TO THE LANGUAGE OF LAW* 50 (1996); *see also* 1 CHARLES KNIGHT, *ARTS AND SCIENCES OR FOURTH DIVISION OF "THE ENGLISH CYCLOPEDIA"* 725-26 (1866) (noting that "ATTAINDER" is derived "from the Latin word *attinctus*, 'attaint,' 'stained,'" and that "[t]he principle consequences of attainder, according to the ordinary courts of law, are forfeiture of the real and personal estates, and what is technically called corruption of the blood of the offender" and that "[t]he corruption of blood produced by attainder cannot be effectually removed except by authority of Parliament").

237. *THE FEDERALIST No. 44*, in *THE FEDERALIST PAPERS: ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY* 228-29 (James Madison) (Ian Shapiro ed., 2009). *Federalist No. 44* appeared in the *New York Packet* on January 25, 1788. *THE FEDERALIST NO. 44* (James Madison), <https://guides.loc.gov/federalist-papers/text-41-50>.

In *The Federalist No. 78*, Alexander Hamilton—also writing as “Publius”—had this to say about those legal protections: “The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like.”<sup>238</sup> As Hamilton stressed:

Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.<sup>239</sup>

#### VI. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND EQUAL PROTECTION OF THE LAWS

Today, the Rule of Law—as a concept—is as important as it was after World War II, when war, genocide, and countless Nazi atrocities led to the creation of the United Nations in 1945<sup>240</sup> and the promulgation of the Universal Declaration of Human Rights (1948).<sup>241</sup> The Universal

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238. THE FEDERALIST NO. 78 (Alexander Hamilton), <https://guides.loc.gov/federalist-papers/text-71-80>.

239. *Id.*

240. See generally STEPHEN C. SCHLESINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS – A STORY OF SUPERPOWERS, SECRET AGENTS, WARTIME ALLIES AND ENEMIES, AND THEIR QUEST FOR A PEACEFUL WORLD (2003) (describing the founding conference of the United Nations in San Francisco in 1945); see also Sellers, *An Introduction to the Rule of Law in Comparative Perspective*, *supra* note 80, at 1 (“The rule of law has a long history in the aspirations of oppressed peoples everywhere. Developing societies seek to establish the rule of law, well-regulated societies seek to preserve it, and most governments claim to maintain it, whatever the nature of their actual practices. This makes the rule of law a nearly universal value, endorsed by the United Nations General Assembly, for example, which has repeatedly identified ‘human rights, the rule of law and democracy’ as ‘universal and indivisible core values and principles of the United Nations.’”).

241. See JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT 1 (1999); see also MIREILLE DELMAS-MARTY, ORDERING PLURALISM: A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING THE TRANSNATIONAL LEGAL WORLD 97 (Naomi Norberg trans., 2009) (“The global order as we know it was set out in the San Francisco Charter establishing the United Nations in June 1945 and the Universal Declaration of Human Rights, adopted in Paris in 1948. Designed according to principles the drafters thought clear (peace through collective security, human rights that are universal because indivisible) and an architecture they thought simple (General Assembly, Security Council, Economic and Social Council, Trusteeship Council, Secretariat and International Court of Justice), the United Nations has been enriched by the adoption of legal instruments in areas as diverse as human rights, trade, health and the environment.”); MICHELINE R. ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA 218 (2004) (discussing the Universal Declaration of Human Rights and observing, “‘Never again!’ was the rallying cry of Jews and human rights activists after World War II.”).

Declaration, the work product of John Peters Humphrey, René Cassin, Eleanor Roosevelt,<sup>242</sup> and many others from delegations around the world,<sup>243</sup> explicitly tied the Rule of Law to the protection of universal human rights,<sup>244</sup> declaring in its preamble that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”<sup>245</sup> The concept of the Rule of Law—as one source notes—

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242. See KERRY WALTERS & ROBIN JARRELL, *BLESSED PEACEMAKERS: 365 EXTRAORDINARY PEOPLE WHO CHANGED THE WORLD* 311 (2013); JOHN P. HUMPHREY, *THE UNITED NATIONS AND HUMAN RIGHTS* 7-8 (1963); JAY WINTER & ANTOINE PROST, *RENÉ CASSIN AND HUMAN RIGHTS: FROM THE GREAT WAR TO THE UNIVERSAL DECLARATION* 221 (2011); see generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

243. See MORSINK, *supra* note 241, at 4.

244. Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. J. INT'L HUM. RTS. 1, 19 (2004) (“Roosevelt and her colleagues believed that the best protections for freedom and dignity were in the habits and opinions of ordinary citizens and statespersons, reflected in appropriate laws and institutions. They saw the relation between law and culture as a dynamic one: the rule of law is a product of culture, but good laws and institutions set the conditions that foster the habits and attitudes that support good laws and institutions.”). Adherence to the Rule of Law is closely associated with, and absolutely critical to, the protection of basic human rights. Danilo Zolo, *The Rule of Law: A Critical Reappraisal*, in *THE RULE OF LAW: HISTORY, THEORY AND CRITICISM* 4 (Pietro Costa & Danilo Zolo eds., 2007) (“[T]he rule of law has been brought back to life in Western culture in close connection with the doctrine of individual rights (or ‘human rights’): one need only think of authors such as Ronald Dworkin, Ralf Dahrendorf, Jürgen Habermas, Norberto Bobbio, and Luigi Ferrajoli. Thus, the rule of law has been revived as a political and legal theory that gives pre-eminence to the protection of human rights, i.e., rights which have been defined by a great number of nineteenth- and twentieth-century national constitutions and international conventions, in particular the rights to life, personal security, freedom, private property, and contractual autonomy, as well as political rights.”); Elizabeth Burleson, *Tribal, State, and Federal Cooperation to Achieve Good Governance*, 40 AKRON L. REV. 207, 218 (2007) (“Commitment to the rule of law and protection of human rights requires institutions that are representative, legitimate and accountable.”); compare Comment, Nicholas (Cole) Fegen, *Thick or Thin? Defining Rule of Law: Why the “Arab Spring” Calls for a Thin Rule of Law Theory*, 80 UMKC L. REV. 1187, 1197 (2012) (“One way of defining rule of law is to focus on the broad, formal aspects of a system of government. These types of definitions are typically referred to as ‘minimalist’ or ‘thin’ theories. ‘Thin theorists’ tend to approach defining rule of law in a way that focuses on the instrumental aspects of rule of law that a state must possess in order to effectively function as a system of law.”) with *id.* at 1199-1200 (“[S]ome scholars prefer a ‘thick,’ substantive approach to defining rule of law that attempts to provide specific content to the formal aspects of the rule of law, especially by emphasizing commitments to human rights. As one thick theorist has written, ‘a state which savagely represses or persecutes sections of its people [does not genuinely follow the rule of law simply because it undertakes those heinous acts according to] detailed laws duly enacted and scrupulously observed.’ Therefore, to thick theorists, rule of law as a concept must include at least some substantive criteria, including, at a minimum, protection of human rights and gender equality.”).

245. UNIVERSAL DECLARATION OF HUMAN RIGHTS, pmbl. (1948). The very first article of the Universal Declaration recites that “[a]ll human beings are born free and equal in dignity and rights,” with the next article declaring that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour,

thus played a “central role” in the Universal Declaration’s genesis, with Sir Hersch Lauterpacht—a prominent British lawyer who served on the International Court of Justice<sup>246</sup>—writing in 1950 that “the most effective way of giving reality to it is through the normal activity of national courts and other organs applying the law of the land.”<sup>247</sup> In

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sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” *Id.* arts. 1-2. The articles that follow then recite a variety of universal rights possessed by human beings, all of which further the Rule of Law itself. *E.g.*, *id.* art. 3 (“Everyone has the right to life, liberty and security of person.”); *id.* art. 4 (“No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”); *id.* art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); *id.* art. 6 (“Everyone has the right to recognition everywhere as a person before the law.”); *id.* art. 7 (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”); *id.* art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”); *id.* art. 9 (“No one shall be subjected to arbitrary arrest, detention or exile.”); *id.* art. 10 (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”). Although Eleanor Roosevelt chaired the drafting committee of the Commission on Human Rights that produced the Universal Declaration, all of the other committee members were men. The Universal Declaration, while protecting the rights of all people, thus has, at times, a decidedly male-centric character. For example, it was, regrettably, not always written in gender-neutral language, making reference merely to a “spirit of brotherhood” and regularly using the male pronoun as a general category, though it also uses, from time to time, the more inclusive “person” and “human beings.” Hilary Charlesworth, *The Mid-Life Crisis of the Universal Declaration of Human Rights*, 55 WASH. & LEE L. REV. 781, 782-83 (1998). As Helen Bequaert Holmes observes of the use of “generic” masculine terms: “A man is sure that he is included; a woman is uncertain.” *Id.* at 783. The U.S. Constitution itself uses only male pronouns in referring to U.S. Senators, members of the U.S. House of Representatives, and the President of the United States. The Constitution, drafted in the late eighteenth century by a body made up exclusively of men, thus uses “he” in Article I in laying out the qualifications to be elected to the House of Representatives and the U.S. Senate. *See* U.S. CONST. art. I, §§ 2-3. Likewise, the Constitution repeatedly uses male pronouns (i.e., “He,” “his,” and “him”) in describing the President of the United States in Article II, with the 25th Amendment—added to the Constitution nearly 100 years after the Fourteenth Amendment guaranteed “equal protections of the law”—still referring to the President using “he” or “his.” *See* U.S. CONST. art. II, §§ 1-3; U.S. CONST. amend. XXV; *see also* U.S. CONST. amend. XX. Since the 1940s, when the Universal Declaration of Human Rights was adopted, gender-neutral drafting of laws has become the norm in many jurisdictions. *See, e.g.*, Daniel Greenberg, *The Techniques of Gender-neutral Drafting*, in DRAFTING LEGISLATION: A MODERN APPROACH 63 (Constantin Stefanou & Helen Xanthaki eds., 2008); Sandra Petersson, *Gender-Neutral Drafting: Recent Commonwealth Developments*, 20 STATUTE L. REV. 35, 35 (1999) (describing “the approaches various Commonwealth jurisdictions have adopted to make the language of their statute books gender neutral, in particular initiatives in the UK, New Zealand, Australia, and Canada”).

246. *See generally* ELIHU LAUTERPACHT, THE LIFE OF HERSCH LAUTERPACHT, QC, FBA, LLD (2010).

247. INT’L COMM’N OF JURISTS, DEVELOPMENT, HUMAN RIGHTS AND THE RULE OF LAW: REPORT OF A CONFERENCE HELD IN THE HAGUE ON 27 APRIL – 1 MAY 1981, at 67 (1981).

short, the stronger a society's Rule of Law tradition and ethic, the better human rights will be protected.

The Universal Declaration was a major advance in legal thought because lawmakers in the eighteenth and nineteenth centuries—and, it must be said, for so many who came thereafter—abjectly failed to address the scourges of slavery and racism, misogyny and sexism, and homophobia and xenophobia.<sup>248</sup> That failure, which denied equality to all, has necessitated the human rights advocacy of scores of pioneering leaders to rectify and remedy the prejudices and errors of the past. Change may be inevitable, but only through determination, grit, and collective action does lasting, *positive* change come. As anthropologist Margaret Mead is widely reported to have once expressed her belief in the potential for human beings to bring about constructive change: “Never doubt that a small group of thoughtful people can change the world; indeed, it's the only thing that ever has.”<sup>249</sup>

Over the centuries, many such civic and political leaders have tirelessly fought for different causes. William Wilberforce,<sup>250</sup> Frederick Douglass,<sup>251</sup> Sojourner Truth,<sup>252</sup> and Harriet Tubman<sup>253</sup> fought against slavery. Charles Hamilton Houston,<sup>254</sup> Thurgood Marshall,<sup>255</sup> Martin

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248. See, e.g., MISOGYNY IN THE WESTERN PHILOSOPHICAL TRADITION: A READER 135-80 (Beverly Clack ed., 1999) (discussing misogyny during the Enlightenment); see generally LOUIS SALA-MOLINS, DARK SIDE OF THE LIGHT: SLAVERY AND THE FRENCH ENLIGHTENMENT (John Conteh-Morgan trans., 2006) (discussing the issue of slavery in the context of the Enlightenment); STEPHEN ERIC BRONNER, RECLAIMING THE ENLIGHTENMENT: TOWARD A POLITICS OF RADICAL ENGAGEMENT 7 (2004) (noting that while “[t]he Enlightenment was always a movement of protest against the exercise of arbitrary power, the force of custom and ingrained prejudices, and the justification of social misery,” that “Western nations still carry the scars of racism, sexism, homophobia, xenophobia, and class inequality”).

249. NANCY C. LUTKEHAUS, MARGARET MEAD: THE MAKING OF AN AMERICAN ICON 261 (2008).

250. See generally WILLIAM HAGUE, WILLIAM WILBERFORCE: THE LIFE OF THE GREAT ANTI-SLAVE TRADE CAMPAIGNER (2007).

251. See generally DAVID W. BLIGHT, FREDERICK DOUGLASS, PROPHET OF FREEDOM (2018).

252. See generally NELL IRVIN PAINTER, SOJOURNER TRUTH: A LIFE, A SYMBOL (1996).

253. See generally CATHERINE CLINTON, HARRIET TUBMAN: THE ROAD TO FREEDOM (2004).

254. See generally CHARLES H. HOUSTON: AN INTERDISCIPLINARY STUDY OF CIVIL RIGHTS LEADERSHIP (James L. Conyers, Jr. ed., 2012); see generally José Felipe Anderson, *The Criminal Justice Principles of Charles Hamilton Houston: Lessons in Innovation*, 35 U. BALT. L. REV. 313 (2006); see also GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS xxiv (1983) (“On the occasion of the formal opening of Howard University’s Law School in May 1958, Justice Thurgood Marshall declared that not he but Charles Hamilton Houston was ‘the First Mr. Civil Rights Lawyer.’”).

255. See generally LARRY S. GIBSON, YOUNG THURGOOD: THE MAKING OF A SUPREME COURT JUSTICE (2012).

Luther King Jr.,<sup>256</sup> Claudette Colvin,<sup>257</sup> Rosa Parks,<sup>258</sup> John Lewis,<sup>259</sup> and many others fought for civil rights and racial equality.<sup>260</sup> Elizabeth Cady Stanton,<sup>261</sup> Susan B. Anthony,<sup>262</sup> Jane Addams,<sup>263</sup> Ida B. Wells,<sup>264</sup> Maud

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256. See generally DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (2015).

257. See *Before Rosa Parks, A Teenager Defied Segregation On An Alabama Bus*, NPR (Mar. 2, 2015, 6:13 PM), <https://www.npr.org/sections/codeswitch/2015/02/27/389563788/before-rosa-parks-a-teenager-defied-segregation-on-an-alabama-bus>; see also Taylor-Dior Rumble, *Claudette Colvin: The 15-year-old who came before Rosa Parks*, BBC (Mar. 10, 2018), <https://www.bbc.com/news/stories-43171799> (“Colvin was the first person to be arrested for challenging Montgomery’s bus segregation policies, so her story made few local papers—but nine months later, the same act of defiance by Rosa Parks was reported all over the world.”).

258. See generally JOYCE A. HANSON, ROSA PARKS: A BIOGRAPHY (2011); see generally ROSA PARKS & JIM HASKINS, ROSA PARKS: MY STORY (1999).

259. See generally JON MEACHAM, HIS TRUTH IS MARCHING ON: JOHN LEWIS AND THE POWER OF HOPE (2020).

260. See, e.g., ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE (1984); see generally TAYLOR BRANCH, THE KING YEARS: HISTORIC MOMENTS IN THE CIVIL RIGHTS MOVEMENT (1988).

261. See generally HARRIET SIGERMAN, ELIZABETH CADY STANTON: THE RIGHT IS OURS (2001).

262. See generally KATHLEEN BARRY, SUSAN B. ANTHONY: A BIOGRAPHY (2020).

263. *Jane Addams*, NAT’L PARK SERVICE (July 31, 2020), <https://www.nps.gov/people/jane-addams.htm>.

264. *Ida B. Wells*, NAT’L PARK SERVICE (Dec. 30, 2020), <https://www.nps.gov/people/idabwells.htm>; see also *20 Suffragists To Know for 2020*, NAT’L PARK SERVICE (Aug. 10, 2020), <https://www.nps.gov/subjects/womenshistory/20-for-2020.htm>.



Malone<sup>265</sup> and countless other suffragists fought for the right to vote.<sup>266</sup> And other women's rights activists, from Margaret Sanger<sup>267</sup> and Mary McLeod Bethune<sup>268</sup> to Sandra Day O'Connor<sup>269</sup> and Ruth Bader

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265. Maude Malone, a librarian, was a vocal advocate in New York's women's suffrage movement. Malone led parades and open-air meetings in support of the cause, and she was not afraid to let her opinions be known, whether on soapboxes, in picketing the White House, or as a protestor in New York. When presidential candidate Woodrow Wilson spoke to a large assembly of Democratic Party members in Brooklyn, New York, on October 19, 1912, she rose from her seat in the middle of his speech and yelled out, "You have just been talking about monopolies, and what about woman's suffrage? The men have a monopoly of the suffrage." After Wilson said he was there to discuss national questions and that he regarded the suffrage question as a state question, she persisted, saying "I am speaking to you as an American." After Malone remained standing, asked another question, and refused to take her seat, she was removed from the meeting, arrested, and later fined five dollars after being convicted of provision of New York's penal code providing: "A person who, without authority of law, willfully disturbs any assembly or meeting, not unlawful in its character, is guilty of a misdemeanor." In rejecting her First Amendment defense and affirming her conviction, the New York appellate court wrote in 1913 in *People v. Malone*:

What this defendant did is but a little think in itself, but it is not venial in the eye of the law. If the law should blink at little things which are unlawful, irresponsible enthusiasts may be encouraged to commit grave offenses. In the oft-quoted maxim, 'This is a government of laws, not men,' 'men' includes women. There is no question of free speech or of oppression involved in the case, and it does not bulk large with incidental questions of liberty. There is but the simple question whether the defendant—a person—willfully disturbed a meeting in violation of the statute.

Malone, in fact, was arrested and fined multiple times for heckling candidates. "When there's a situation in politics that just seems to call for attention, she just puts on her war bonnet, pins her yellow banner across her breast, and sallies forth alone against the political machinery of New York," the *Woman's Journal* wrote of Malone. LINDA J. LUMSDEN, RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT OF ASSEMBLY 33, 45-46, 74, 130, 158, 165 (1997); *People v. Malone*, 156 A.D. 10, 12, 141 N.Y.S. 149, 150-53 (App. Div. 1913). Acts of civil disobedience have often driven changes in the law. *Civil Disobedience*, STAN. ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/entries/civil-disobedience/> (last updated Dec. 20, 2013) ("The term 'civil disobedience' was coined by Henry David Thoreau in his 1848 essay to describe his refusal to pay the state poll tax implemented by the American government to prosecute a war in Mexico and to enforce the Fugitive Slave Law.").

266. See generally THE WOMEN'S SUFFRAGE MOVEMENT (Sally Roesch Wagner ed., 2019); see generally ROSALYN TERBORG-PENN, AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850-1920 (1998).

267. See generally JEAN H. BAKER, MARGARET SANGER: A LIFE OF PASSION (2011).

268. See generally MARY MCLEOD BETHUNE, BUILDING A BETTER WORLD - ESSAYS AND SELECTED DOCUMENTS (Audrey Thomas McCluskey & Elaine M. Smith eds., 2001).

269. See generally JOAN BISKUPIC, HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE (2009).

Ginsburg<sup>270</sup> also pioneered women's rights and the law and the legal profession.<sup>271</sup>

There have likewise been LGBTQ+ pioneers such as Karl Heinrich Ulrichs<sup>272</sup> and Barbara Gittings,<sup>273</sup> those, like Cesar Chavez,<sup>274</sup> who fought for the rights of immigrants and migrant workers;<sup>275</sup> and advocates for people with disabilities such as Edward Miner

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270. See generally JANE SHERRON DE HART, *RUTH BADER GINSBURG: A LIFE* (2018); see generally RUTH BADER GINSBURG ET AL., *MY OWN WORDS* (2016). The movement for women's rights and for equality of treatment goes back centuries. See, e.g., THE OXFORD HANDBOOK OF WOMEN AND GENDER IN MEDIEVAL EUROPE 6, 593 (Judith M. Bennett & Ruth Mazo Karras eds., 2013) (discussing the work of Christine de Pizan in Medieval times); ROUTLEDGE INT'L ENCYCLOPEDIA OF WOMEN: GLOBAL WOMEN'S ISSUES AND KNOWLEDGE 754 (Cheris Kramarae & Dale Spender eds., 2000) ("Mary Astell, in *A Serious Proposal to the Ladies* (two parts, 1694 and 1697) and *Reflections upon Marriage* (1700), voiced seldom-articulated, unpalatable truths about women's oppression. Astell based her thinking on Descartes's high valuation of intellect: reason, she argued, was the ungendered, defining characteristic. Custom (whose random historical accretions governed education and marriage, for instance) was open to legitimate questions when it flouted the dictates of reason.").

271. See generally LINDA HIRSHMAN, *SISTERS IN LAW: HOW SANDRA DAY O'CONNOR AND RUTH BADER GINSBURG WENT TO THE SUPREME COURT AND CHANGED THE WORLD* (2015).

272. TEA UGLOW, *LOUD AND PROUD: LGBTQ+ SPEECHES THAT EMPOWER AND INSPIRE* 15 (2020) (noting that in 1867, Karl Heinrich Ulrichs (1825-1895) "appeared before the Congress of German Jurists in Munich to appeal for the abolition of the sodomy statute").

273. See generally TRACY BAIM, *BARBARA GITTINGS: GAY PIONEER* (2015); see also Tim Fitzsimons, *LGBTQ History Month: Transgender and gender-nonconforming pioneers*, NBC NEWS (Oct. 28, 2018, 9:51 AM), <https://www.nbcnews.com/feature/nbc-out/lgbtq-history-month-transgender-gender-nonconforming-pioneers-n925031>; see generally JUDY RICKARD, *TORN APART: UNITED BY LOVE, DIVIDED BY LAW* (2011).

274. See generally MIRIAM PAWEL, *THE CRUSADES OF CESAR CHAVEZ: A BIOGRAPHY* (2014).

275. See generally *RALLYING FOR IMMIGRANT RIGHTS: THE FIGHT FOR INCLUSION IN 21ST CENTURY AMERICA* (Kim Voss & Irene Bloemraad eds., 2011).

Gallaudet,<sup>276</sup> Patrisha Wright,<sup>277</sup> and Paula Goldberg.<sup>278</sup> And in the anti-death penalty arena, which has occupied so much of my own scholarly agenda,<sup>279</sup> there were early anti-gallows campaigners such as Benjamin Rush,<sup>280</sup> Edward Livingston,<sup>281</sup> Robert Rantoul Jr.,<sup>282</sup> and Marvin Bovee,<sup>283</sup> and—in modern times—prominent figures like Anthony

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276. See generally 2 EDWARD MINER GALLAUDET, HISTORY OF THE COLLEGE FOR THE DEAF, 1857-1907 (Lance J. Fischer & David L. de Lorenzo eds., 1983); see also 2 ENCYCLOPEDIA OF DISABILITY: A HISTORY IN PRIMARY SOURCES 756 (Sharon L. Snyder & David T. Mitchell eds., 2006) (“Edward Miner Gallaudet, an influential nineteenth-century educator, was the founder of the world’s first institution of higher education for deaf people.”); see also *id.* at 756-57 (noting that Thomas Hopkins Gallaudet, the father of Edward Miner Gallaudet, had traveled to Europe in 1815 to learn how to teach deaf children, received training there from Jean Massieu and Laurent Clerc, and then established “the first permanent school for the deaf in the United States in 1817”).

277. TIM MCNEESE, DISABILITY RIGHTS MOVEMENT 90 (2014) (noting that Patrisha A. Wright, in her fight for the Americans with Disabilities Act, was known as “the general” and that Wright “joined the ranks of the disability rights activists in 1977 when she participated in a demonstration in San Francisco” and was “instrumental in passing much of the important disability-related legislation in the 1980s and 1990s”). The Americans with Disabilities Act (“ADA”) became a template for legislation around the world and, in time, led to the U.N. Convention on the Rights of Persons with Disabilities. LENNARD J. DAVIS, *Author’s Note* in ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST US MINORITY ITS RIGHTS (2015).

278. Mike Hanks, *PACER Center director receives award*, SUN CURRENT (Jan. 16, 2018), [https://www.hometownsource.com/sun\\_current/community/bloomington/pacer-center-director-receives-award/article\\_ca9d51a2-fafb-11e7-88df-673ac739da1f.html](https://www.hometownsource.com/sun_current/community/bloomington/pacer-center-director-receives-award/article_ca9d51a2-fafb-11e7-88df-673ac739da1f.html) (“In 1978, [Paula] Goldberg co-founded PACER Center to help parents of children with a disability know their rights and expand opportunities for their sons and daughters. PACER supports families of youth with disabilities using a ‘parents helping parents’ model. Today, PACER has more than 70 staff members and more than 35 programs, including the National Bullying Preventing Center, which was founded in 2006. Other programs offer advocacy resources for youth, workshops and leadership training for parents, independent housing information and an assistive technology center.”).

279. See, e.g., John D. Bessler, *What I Think About When I Think About the Death Penalty*, 62 ST. LOUIS U. L. REV. 781, 791-92 (2018).

280. THE DEATH PENALTY TODAY vii (Robert M. Bohm ed., 2008) (“In the late eighteenth century, Dr. Benjamin Rush (1747–1813), a Philadelphia physician and signer of the Declaration of Independence, was among the most vocal opponents of the death penalty in the United States.”).

281. See generally EDWARD LIVINGSTON, ARGUMENT OF EDWARD LIVINGSTON, AGAINST CAPITAL PUNISHMENT (N.Y. State Soc’y for the Abolition of Capital Punishment 1847).

282. John Cyril Barton, *Antigallows Activism in Antebellum American Literature*, in DEMANDS OF THE DEAD: EXECUTIONS, STORYTELLING, AND ACTIVISM IN THE UNITED STATES 139, 146-47 (Katy Ryan ed., 2012).

283. Elwood R. McIntyre, *A Farmer Halts the Hangman: The Story of Marvin Bovee*, 42 WIS. MAG. HIST. 3, 3 (1958) (“A single term in the legislature of 1853, as leader of a hard-fought but successful drive to abolish capital punishment in Wisconsin, turned Senator Marvin H. Bovee, Waukesha County farmer, into a zealous and resourceful penal reformer. Brought suddenly into prominence, his aid was sought in many antigallows campaigns across the nation during the ensuing thirty-five years.”).

Amsterdam,<sup>284</sup> Bryan Stevenson,<sup>285</sup> Stephen Bright,<sup>286</sup> Robert Badinter,<sup>287</sup> Diann Rust-Tierney,<sup>288</sup> and Sister Helen Prejean.<sup>289</sup> Of course, through the centuries scores of other activists, civic leaders, and human rights defenders have participated in social movements and civil rights and environmental justice campaigns to address gross violations of human rights.<sup>290</sup>

Ironically, in the political context, the American revolutionaries who *fought* for liberty and independence from England's monarchy themselves *denied* liberty—*en masse*, to borrow a French term<sup>291</sup>—to minorities and women. Early American presidents—George Washington, Thomas Jefferson, James Madison, James Monroe and Andrew Jackson, among them—kept scores of people in human bondage, including while they served as head of state.<sup>292</sup> Jefferson wrote

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284. MICHAEL KRONENWETTER, CAPITAL PUNISHMENT: A REFERENCE HANDBOOK 158 (2d ed. 2001).

285. See generally BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014).

286. See generally Stephen B. Bright, *Independence of Counsel: An Essential Requirement for Competent Counsel and a Working Adversary System*, 55 HOUS. L. REV. 853 (2018); see generally Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671 (2015); Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WIS. L. REV., Oct. 2000.

287. See generally ROBERT BADINTER, ABOLITION: ONE MAN'S BATTLE AGAINST THE DEATH PENALTY (2008).

288. Diann Rust-Tierney, NAT'L COALITION TO ABOLISH THE DEATH PENALTY, <https://www.ncadp.org/authors/entry/diann-rust-tierney> (last visited Mar. 15, 2021).

289. See generally SISTER HELEN PREJEAN, DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES (1993); see generally SISTER HELEN PREJEAN, RIVER OF FIRE: MY SPIRITUAL JOURNEY (2019).

290. See generally KARA E. STOOKSBURY, JOHN M. SCHEB II & OTIS H. STEPHENS JR., ENCYCLOPEDIA OF AMERICAN CIVIL RIGHTS AND LIBERTIES (Kara E. Stooksbury et al. eds., rev. ed. 2017); ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM: THE SOCIAL JUSTICE CHALLENGE TO THE ENVIRONMENTAL MOVEMENT 28 (Ronald Sandler & Phaedra C. Pezzullo eds., 2007).

291. BARBARA ANN KIPFER, PHRASEOLOGY: THOUSANDS OF BIZARRE ORIGINS, UNEXPECTED CONNECTIONS, AND FASCINATING FACTS ABOUT ENGLISH'S BEST EXPRESSIONS 99 (2008) (noting that *en masse*, in French, literally means "in mass"); STEWART CLARK & GRAHAM POINTON, WORDS: A USER'S GUIDE 118 (2009) (translating *en masse* as "as a whole, all together, in a large number").

292. See, e.g., JESSE J. HOLLAND, THE INVISIBLES: THE UNTOLD STORY OF AFRICAN AMERICAN SLAVES IN THE WHITE HOUSE 5-6 (2016) (noting that twelve U.S. presidents—George Washington, Thomas Jefferson, James Madison, James Monroe, Andrew Jackson, Martin Van Buren, William Henry Harrison, John Tyler, James K. Polk, Zachary Taylor, Andrew Johnson, and Ulysses S. Grant—enslaved people at one point or another in their lives, and that "eight of those twelve slave-holding presidents brought their slaves along to work with them inside the presidential mansions in which they resided: Washington, Jefferson, Madison, Monroe, Jackson, Tyler, Polk, and Taylor."); see also KENNETH C. DAVIS, IN THE SHADOW OF LIBERTY: THE HIDDEN HISTORY OF SLAVERY, FOUR PRESIDENTS, AND FIVE

the Declaration of Independence (1776), declaring “that all Men are created equal,”<sup>293</sup> but—in the hypocrisy of hypocrisies—during his lifetime he kept more than six hundred human beings enslaved at Monticello, his Virginia plantation, and in his fields or mills or at his nailery.<sup>294</sup> The U.S. Constitution, drafted in Philadelphia and ratified in 1788,<sup>295</sup> itself prohibited the slave trade’s abolition until 1808,<sup>296</sup> with Jefferson and Monroe exchanging letters—in the wake of Gabriel’s Rebellion (1800), in which enslaved people in Virginia sought their

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BLACK LIVES xvi (2016) (“To say that people were *enslaved* means this condition was forced on them; it does not define who they were.”); DOUGLAS R. EGERTON, *GABRIEL’S REBELLION: VIRGINIA SLAVE CONSPIRACIES OF 1800 AND 1802*, at 186 (1992) (noting that more than two dozen people were hanged in the fall of 1800 after Gabriel, an enslaved man, led a rebellion in Virginia); see TIM MCGRATH, *JAMES MONROE: A LIFE* (2020), ch. 9 (discussing Gabriel’s Rebellion).

293. ALLEN JAYNE, *JEFFERSON’S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY AND THEOLOGY* 109 (1998); see also STEPHEN J. SPIGNESI, *THE ITALIAN 100: A RANKING OF THE MOST INFLUENTIAL CULTURAL, SCIENTIFIC, AND POLITICAL FIGURE, AND PAST AND PRESENT* 27-28 (2003) (noting that Jefferson translated the writings of Filippo Mazzei, an Italian thinker who settled on a farm near Charlottesville adjoining Jefferson’s estate, Monticello, and that Mazzei—writing under the pseudonym “Furioso,” Italian for *furious*—observed: “All men are by nature equally free and independent . . . each equality is necessary in order to create a free government. All men must be equal to each other in natural law.”); *UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE: A NEW AND ORIGINAL WORK PRESENTING FOR CONVENIENT REFERENCE THE ORTHOGRAPHY, PRONUNCIATION, MEANING, USE, ORIGIN AND DEVELOPMENT OF EVERY WORD IN THE ENGLISH LANGUAGE* 2235 (Robert Hunter & Charles Morris, eds. 1897) (noting the Italian translation for “furioso”).

294. Sue Kozel, *Thomas Jefferson’s Complicated Friends*, in *QUAKERS, BUSINESS AND CORPORATE RESPONSIBILITY: LESSONS AND CASES FOR RESPONSIBLE MANAGEMENT* 137, 150 (Nicholas Burton & Richard Turnbull eds., 2019); see also MYRA WEATHERLY, *BENJAMIN BANNEKER: AMERICAN SCIENTIFIC PIONEER* 12-13 (2006) (noting how Benjamin Banneker wrote to Thomas Jefferson about the incongruity of the words of the Declaration of Independence and the institution of slavery, and of how Banneker “accused Jefferson and the other Founding Fathers of not fulfilling their pledge to preserve the rights of all Americans”); see also Letter from Benjamin Banneker, Astronomer, to Thomas Jefferson, Secretary of State, U.S. (Aug. 19, 1791), <https://founders.archives.gov/documents/Jefferson/01-22-02-0049>.

295. See generally PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-88* (2011).

296. JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-2002*, at 414 (2d ed. 2003) (“Article I, Section 9 granted Congress the power to limit the foreign slave trade after 1808, but it did not directly address congressional control of the interstate slave trade.”); see also JONATHAN ISRAEL, *THE EXPANDING BLAZE: HOW THE AMERICAN REVOLUTION IGNITED THE WORLD, 1775-1848*, at 156 (2017) (noting of the Constitutional Convention in Philadelphia and its failure to address the issue of slavery: “In the end, Northern as well as Southern delegates colluded in burying the whole issue and excluding direct reference to ‘slavery’ in the Constitution’s final wording so as to avoid offending the sensibilities of those unwilling to include the word ‘slavery’ in the nation’s foundation text. The result was that the United States Federal Constitution, utilizing respectable circumlocutions, condoned slavery indefinitely, precluded Congress from prohibiting the slave trade for two decades . . . , and required all states, under strict rules, to return fugitive slaves to bondage and their owners.”).

freedom<sup>297</sup>—about how to punish those who participated in it. The principal subject of their exchange: about the use of capital punishment and whether or not “to stay the hand of the executioner.”<sup>298</sup> Slavery itself was not abolished in the U.S. until December 6, 1865,<sup>299</sup> after the Civil War had claimed hundreds of thousands of lives<sup>300</sup> and John Wilkes Booth, a white supremacist, assassinated President Abraham Lincoln at Ford’s Theatre.<sup>301</sup>

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297. MARTIN A. KLEIN, *HISTORICAL DICTIONARY OF SLAVERY AND ABOLITION* 185 (2d ed. 2014) (“Gabriel’s Rebellion was an effort to overthrow slavery in Virginia.”); CARYN E. NEUMANN, *TERM PAPER RESOURCE GUIDE TO AFRICAN AMERICAN HISTORY* 43 (2009) (“Gabriel’s Rebellion took place in Richmond, Virginia in 1800. Gabriel Prosser, a 24-year-old enslaved blacksmith, led the largest slave plot in the early years of the new nation. The conspiracy reputedly involved most of the slaves in the Richmond area and many throughout the rest of Virginia. It taught slaveowners that they could never count on the submission of the slaves around them.”).

298. James Monroe, Governor, Virginia, to Thomas Jefferson, Vice President, U.S. (Sept. 15, 1800) (“We have had much trouble with the negroes here. The plan of an insurrection has been clearly proved, & appears to have been of considerable extent. [Ten] have been condemned & executed, and there are at least twenty perhaps 40 more to be tried, of whose guilt no doubt is entertained. It is unquestionably the most serious and formidable conspiracy we have ever known of the kind: tho’ indeed to call it so is to give no idea of the thing itself. . . . Where to arrest the hand of the Executioner, is a question of great importance.”); Thomas Jefferson, Vice President, U.S. to James Monroe, Governor, Virginia (Sept. 20, 1800) (“Where to stay the hand of the executioner is an important question. [T]hose who have escaped from immediate danger, must have feelings which would dispose them to extend the executions. [E]ven here, where every thing has been perfectly tranquil, but where a familiarity with slavery, and a possibility of danger from that quarter prepare the general mind for some severities, there is a strong sentiment that there has been hanging enough. [T]he other states & the world at large will for ever condemn us if we indulge a principle of revenge, or go one step beyond absolute necessity.”). Other rebellions by enslaved persons would be met by executions, too. *See, e.g.,* NAT TURNER, *A SLAVE REBELLION IN HISTORY AND MEMORY* 18 (Kenneth S. Greenberg ed., 2003) (noting that Nat Turner was hanged in Jerusalem, Virginia in 1831).

299. Sandra L. Rierison, *The Thirteenth Amendment as a Model for Revolution*, 35 VT. L. REV. 765, 861 (2011) (“In voting to end slavery via the Thirteenth Amendment, Congress recognized that public sentiment had evolved sharply from where it stood during the years leading up to the Civil War . . . . Less than a year after the House of Representatives approved the Amendment, on December 6, 1865, the Thirteenth Amendment was ratified by the necessary margin of two-thirds of the States, abolishing the institution of slavery throughout the United States immediately and permanently.”).

300. *E.g.,* Arthur H. Garrison, *Disproportionate Incarceration of African Americans: What History and the First Decade of the Twenty-First Century Have Brought*, 2011 J. INST. JUST. INT’L STUD. 87, 109 (noting that the Civil War led to the loss of “more than 600,000 lives”); *see also* Shannon Moeck, *The Lost Generation*, in Robert M. Dunkerly, *TO THE BITTER END: APPOMATTOX, BENNETT PLACE, AND THE SURRENDERS OF THE CONFEDERACY* 163 (2015) (“In total, more than 620,000 deaths—perhaps as many as 750,000—and more than one million total casualties occurred during the Civil War, for both the North and South.”).

301. *E.g.,* DAVID HERBERT DONALD, *LINCOLN* 596-97 (2011); David S. Reynolds, *John Wilkes Booth and the Higher Law*, ATLANTIC (Apr. 12, 2015), <https://www.theatlantic.com/politics/archive/2015/04/john-wilkes-booth-and-the-higher-law/385461/>.

In early America, women and Native Americans were likewise systematically subjugated and oppressed. In a 1776 letter, Abigail Adams—the wife of the prominent Massachusetts lawyer who would later become America’s second president—had implored her husband, John Adams, to “Remember the Ladies.”<sup>302</sup> But America’s founders utterly failed to do so,<sup>303</sup> even though some from that era (and others prior to their time)<sup>304</sup> had advocated for the recognition of women’s

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302. WOODY HOLTON, *ABIGAIL ADAMS: A LIFE* 99 (2009). In her letter, written from Braintree, Massachusetts on March 31, 1776, Abigail Adams wrote to her husband:

I long to hear that you have declared an independency—and by the way in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If perticular care and attention is not paid to the Laidies we are determined to foment a Rebellion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation. That your Sex are Naturally Tyrannical is a Truth so thoroughly established as to admit of no dispute, but such of you as wish to be happy willingly give up the harsh title of Master for the more tender and endearing one of Friend. Why then, not put it out of the power of the vicious and the Lawless to use us with cruelty and indignity . . .

Abigail Adams, to John Adams, Mass. delegate, Cont’l Cong. (Mar. 31, 1776), <https://www.masshist.org/digitaladams/archive/doc?id=L17760331aa>.

303. COKIE ROBERTS, *FOUNDING MOTHERS: THE WOMEN WHO RAISED OUR NATION* 12 (2004) (“Though many of the marriages of the Founders, like that of Abigail and John Adams, were true partnerships, the women had no legal rights. Under a system called ‘coverture,’ their husbands essentially owned women. They had some rights to inheritance, either to the property they brought into a marriage or to a portion of their husband’s property, but in the context of the marriage itself they owned nothing, not even their own jewelry.”); *see also* *BEYOND THE FOUNDERS: NEW APPROACHES TO THE POLITICAL HISTORY OF THE EARLY AMERICAN REPUBLIC* 60 (Jeffrey L. Pasley, Andrew W. Robertson & David Waldstreicher eds., 2004) (noting that “[i]n colonial America . . . husbands had the right to wield complete authority over their wives’ property by virtue of the laws of coverture.”). For a history of coverture, *see generally* *MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD* (Tim Stretton & Krista Kesselring eds., 2013).

304. *FEMINIST HISTORY OF PHILOSOPHY: THE RECOVERY AND EVALUATION OF WOMEN’S PHILOSOPHICAL THOUGHT* 5 (Eileen O’Neill & Marcy P. Lascano eds., 2019) (“‘Claims for the equality of the sexes, grounded in the Christian doctrine of equality of souls and in appeals to reason, were a long-standing feature of European intellectual debate since the early fifteenth century, when, by invoking Lady Reason, Christine de Pizan first challenged French male writers who demeaned women in print. By the seventeenth century, this argument for sexual equality had been explicitly stated by writers such as Marie Le Jars de Gournay, in her treatise *De l’égalité des hommes et des femmes* [*On the Equality of Men and Women*, 1622].’”) (quoting KAREN OFFEN, *EUROPEAN FEMINISMS, 1700-1950: A POLITICAL HISTORY* 31 (2000)); 3 SISTER PRUDENCE ALLEN, *THE CONCEPT OF WOMAN: THE SEARCH FOR COMMUNION OF PERSONS, 1500-2015*, at 308 (2016) (noting that François Poullain de la Barre (1647-1723) was “[t]he first philosopher to write lengthy and detailed works incorporating Cartesian philosophy to defend women’s identity as equal to men,” with Poullain—in the 1670s using a pseudonym—publishing “three works on women’s equality with men and on women’s rights to have access to all levels of higher education,” including one work titled *De l’égalité des deux sexes* (*The equality of the two sexes*), “published in 1673, to highlight the Cartesian-based arguments for physical, mental, and moral equality of women and man.”).

rights.<sup>305</sup> Women were not guaranteed the right to vote until much later—in the case of federal elections, not until the Nineteenth Amendment was ratified in 1920.<sup>306</sup> Also, a large number of Native Americans were killed (*e.g.*, in Mankato, Minnesota, on December 26, 1862, a mass hanging took the lives of thirty-eight Dakota Indians),<sup>307</sup> and they were driven off and exiled from their ancestral lands,<sup>308</sup> with

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305. CONDORCET: WRITINGS ON THE UNITED STATES 135 n.20 (Guillaume Ansart ed. & trans., 2012) (noting that “Condorcet was a fervent advocate of women’s rights”) (citing MARIE-JEAN-ANTOINE-NICOLAS CARITAT & MARQUIS DE CONDORCET, ON THE ADMISSION OF WOMEN TO THE RIGHTS OF CITIZENSHIP (Alice Drysdale Vickery trans., 1790) [*Sur l’admission des femmes au droit de cité*]); LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA 21-22 (1980) (“Condorcet pointed out that although women had not exercised the right of citizenship in any ‘constitution called free,’ the right to political voice in a republic was generally claimed by men on grounds that might equally well be claimed by women—that they were ‘sensible beings, capable of reason, having moral ideas.’ . . . He concluded what is perhaps his generation’s most detailed statement of the political rights and responsibilities of women with the comment: ‘Perhaps you will find this discussion too long; but think that it is about the rights of half of human beings, rights forgotten by all the legislators . . . .’ ”); THE ITALIAN AMERICAN EXPERIENCE: AN ENCYCLOPEDIA 362 (Salvatore J. La Gumina et al. eds., 2005) (noting that Philip Mazzei, Thomas Jefferson’s Italian-born neighbor at Monticello, “was a thinker before his time,” promoted “equal rights for all people” and the “education of slaves before their emancipation,” and “opposed the idea of men as the stronger sex and held that women have rights, too”).

306. See SUSAN ZIMET & TODD HASAK-LOWY, ROSES AND RADICALS: THE EPIC STORY OF HOW AMERICAN WOMEN WON THE RIGHT TO VOTE 147 (2018); see also KENNETH JANDA ET AL., THE CHALLENGE OF DEMOCRACY: AMERICAN GOVERNMENT IN GLOBAL POLITICS 181 (14th ed. 2018) (“Until 1869, women could not vote anywhere in the world. American women began to organize to obtain suffrage in the mid-1800s . . . . Their first major victory did not come until 1869, when Wyoming, still a territory, granted women the right to vote.”); see also History.com Editors, *Wyoming legislators write the first state constitution to grant women the vote*, HISTORY, <https://www.history.com/this-day-in-history/wyoming-legislators-write-the-first-state-constitution-to-grant-women-the-vote> (last updated Sept. 28, 2020) (noting that “[i]n 1848, the legislature in Washington Territory became the first to introduce a women’s suffrage bill” but that bill “was narrowly defeated,” and that “[o]n September 30, 1889, the Wyoming state convention approve[d] a constitution that includes a provision granting women the right to vote”).

307. JOHN D. BESSLER, LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA 59-62 (2003); SCOTT W. BERG, 38 NOOSES: LINCOLN, LITTLE CROW, AND THE BEGINNING OF THE FRONTIER’S END 234 (2012).

308. MERRIL D. SMITH, WOMEN’S ROLES IN EIGHTEENTH-CENTURY AMERICA 92 (2010) (“The demand for land pushed white settlers into frontier areas. The constant westward movement forced Native Americans to move, too, or to adjust their lifestyles to changes in their environment as colonists built homes and towns. Throughout much of the eighteenth century, there was conflict between Native Americans and white settlers in frontier areas.”); JULIA COATES, TRAIL OF TEARS xiii (2014) (“The removal of tribes whose homelands were in the eastern and mid-western regions of an expanding United States was first promoted as federal policy after the 1803 Louisiana Purchase, during the administration of President Thomas Jefferson. In the two decades immediately following, tribes from the Ohio Valley and Great Lakes regions were forcibly removed to lands west of the Mississippi River—areas in present-day Kansas, Nebraska, and Iowa—apparently without much awareness on the part of the American public.”).



treaties—the foundation of dealings between sovereign peoples<sup>309</sup>—frequently broken.<sup>310</sup> President Andrew Jackson signed the so-called Indian Removal Act into law in 1830,<sup>311</sup> with modern-day scholars documenting what has been called the unprecedented “state-administered mass expulsion of indigenous people.”<sup>312</sup>

In 1868, the ratification of the U.S. Constitution’s Fourteenth Amendment enshrined the concept of “equal protection of the laws” into the nation’s fabric of life.<sup>313</sup> That constitutional amendment was, unfortunately, not immediately read to protect the rights of those it was intended to protect.<sup>314</sup> But gradually, through the application of the U.S.

309. NATION TO NATION: TREATIES BETWEEN THE UNITED STATES AND AMERICAN INDIAN NATIONS xi (Suzan Shown Harjo ed., 2014) (“Repeatedly recognized by the courts as sources of rights for Indian people and their Indian Nations, treaties carry the weight of the past and test the strength of our nation’s commitment to honesty, good faith, and the rule of law. Promises between the leaders of nations, treaties inscribe solemn vows that cannot lightly be broken or ignored—a verity that Supreme Court justice Hugo Black recognized in 1960 when he declared, ‘Great nations, like great men, should keep their word.’”).

310. E.g., Kimbra Cutlip, *In 1868, Two Nations Made a Treaty, the U.S. Broke It and Plains Indian Tribes are Still Seeking Justice*, SMITHSONIAN MAG. (Nov. 7, 2018), <https://www.smithsonianmag.com/smithsonian-institution/1868-two-nations-made-treaty-us-broke-it-and-plains-indian-tribes-are-still-seeking-justice-180970741/>; see also INDIAN TREATIES IN THE UNITED STATES: AN ENCYCLOPEDIA AND DOCUMENTS COLLECTION ix (Donald L. Fixico ed., 2018) (“American Indians hold a unique status in having signed the most treaties of any Indigenous people in the world. After negotiating more than 400 treaties with American officials, a total of 374 were ratified by the U.S. Senate. After an act in 1871 stopped treaty making with the Indian nations, the U.S. government made an additional 97 agreements with American Indians from 1870 to 1904. Together, there are 471 American Indian treaties and agreements.”); *id.* at xi (“While the majority of Indian treaties were negotiated during the 1800s, they are still viable today. American Indians have certain legal rights such as water rights, hunting and fishing rights, land rights, religious rights, and other rights contained in treaties and agreements. More than a thousand court cases have been decided according to U.S.-Indian treaties, and American Indians have dual rights as members of their tribes and as citizens under the U.S. Constitution.”).

311. Ken Drexler, *Indian Removal Act: Primary Documents in American History*, LIBR. OF CONGRESS (Jan. 22, 2019), <https://guides.loc.gov/indian-removal-act>.

312. See, e.g., CLAUDIO SAUNT, *Introduction to UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY* (2020).

313. U.S. CONST. amend XIV. Some scholars have described the “Reconstruction Amendments,” of which the Fourteenth Amendment is a major part, as a “second Constitution.” GARRETT EPPS, *AMERICAN EPIC: READING THE U.S. CONSTITUTION* 159 (2013); see also *id.* at 163 (observing that “the Fourteenth Amendment marks such a change in the meaning, structure, and workings” of the original U.S. Constitution that “the thought is not outlandish” that the Fourteenth Amendment is ‘the second Constitution’ ”); see generally GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* (2013) (describing the history of the drafting and ratification of the Fourteenth Amendment).

314. Timothy P. O’Neill, *New Law, Old Cases, Fair Outcomes: Why the Illinois Supreme Court Must Overrule People v. Flowers*, 43 LOY. U. CHI. L.J. 727, 731-32 (2012) (“The first federal constitutional provision with significant relevance to state criminal prosecutions was the Due Process Clause of the Fourteenth Amendment. Although the Due Process Clause became effective against state action in 1868, the U.S. Supreme Court applied it only sparingly

Supreme Court's "selective incorporation" doctrine, constitutional protections in the U.S. Bill of Rights have been interpreted by the courts and applied to the states in a transformative way.<sup>315</sup> In addition, the Fourteenth Amendment's equal protection guarantee has been applied to protect people's rights (*e.g.*, in the U.S. Supreme Court's decisions in *United States v. Virginia*<sup>316</sup> and *Obergefell v. Hodges*,<sup>317</sup> protecting women's rights and guaranteeing marriage equality, respectively). There are, of course, international covenants and multiple U.N. conventions that outlaw discrimination and that recognize the importance of equality and equal treatment under the law.<sup>318</sup>

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against state court criminal decisions for the next ninety years. It was not until the Warren Court revolution of the 1960's that the U.S. Supreme Court became actively engaged in influencing state criminal law. The Court did this by 'selectively incorporating' most, though not all, of the guarantees of the federal Bill of Rights."); *see also* Susan Schulten, *Barack Obama, Abraham Lincoln, and John Dewey*, 86 DENV. U. L. REV. 807, 814 (2009) ("The articulation of equal protection as a Constitutional principle would not occur until Reconstruction and the Fourteenth Amendment in 1868, and then lay dormant—at least for African-Americans—until Lyndon Johnson signed the nation's most effective civil rights legislation into law nearly a century later.").

315. David Sloss, *Incorporation, Federalism, and International Human Rights*, in HUMAN RIGHTS AND LEGAL JUDGMENTS: THE AMERICAN STORY 79 (Austin Sarat ed., 2017) ("The doctrine developed by the Warren Court in the 1960s is known as 'selective incorporation.' Selective incorporation doctrine is best understood as an uneasy compromise between two incompatible theories: the 'total incorporation' theory and the 'fundamental rights' theory. Total incorporation theory holds that the rights codified in the Bill of Rights bind the states because the Fourteenth Amendment 'incorporates' the first eight amendments and makes them applicable to the states. In contrast, fundamental rights theory rejects the proposition that the Bill of Rights binds the states. It holds that the Fourteenth Amendment due process clause prohibits state governments from infringing 'fundamental rights.'"); AMAR, *supra* note 118, at xv (noting that the Fourteenth Amendment, "[i]n area after area," has "altered the trajectory" of the original Bill.).

316. *United States v. Virginia*, 518 U.S. 515 (1996) (holding that the equal protection guarantee precluded Virginia from reserving for men the unique educational opportunities afforded at the Virginia Military Institute).

317. *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage is licensed and performed out-of-state).

318. THE OXFORD HANDBOOK OF UNITED NATIONS TREATIES 256 (Simon Chesterman et al. eds., 2019) (noting various nondiscrimination provisions in international instruments); *id.* at 254-57 (noting U.N. instruments relating to women and the equality provision in the Convention on the Elimination of all Forms of Discrimination Against Women); RHONA K. M. SMITH, INTERNATIONAL HUMAN RIGHTS LAW 203 (8th ed. 2018) ("The prohibition on race discrimination is entrenched in international law, indeed it is already considered by many scholars to be an example of *ius cogens*."); THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 141 (Ilias Bantekas et al. eds., 2018) ("[E]quality is 'the most important principle imbuing and inspiring the concept of human rights and achieving equality and non-discrimination is 'the dominant and recurring theme of international human rights law.'").

# VII. TYRANNICAL RULE AND ABUSES OF POWER VS. THE RULE OF LAW

It is clear that those in power have—and frequently do—abuse their power. That was certainly true of ancient Rome and Roman emperors, with condemned criminals crucified, clubbed to death, burned alive, fed to wild animals, thrown from the Tarpeian Cliff, or bound in leather sacks with live animals and tossed into bodies of water.<sup>319</sup> “In the Colosseum,” one historian notes of ancient Rome’s famous amphitheater, “a whole series of elaborate executions were staged” in “the guise of certain Greek dramas, whose subject matter entailed the deaths of the actors.”<sup>320</sup> The “actors” were, in actuality, condemned criminals “dressed up as characters from Greek mythology” who “were forced to perform and, at the performance’s climax, were put to death” using “collapsible scaffolds placed above cages of wild beasts.”<sup>321</sup> Rome’s Colosseum could hold tens of thousands of spectators,<sup>322</sup> and it was the sight of innumerable public executions—ones carried out in a gruesome fashion through a variety of means,<sup>323</sup> including burning alive

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319. MITCHEL P. ROTH, A HISTORY OF CRIME AND THE AMERICAN CRIMINAL JUSTICE SYSTEM 19 (3d ed. 2018) (containing a section on “Roman crime and punishment”); Edward M. Peters, *Prison Before the Prison: The Ancient and Medieval Worlds, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 3, 13–21 (Norval Morris & David J. Rothman eds., 1998) (discussing punishments under the laws of Rome); see also CHARLES ANTHON, A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 308–09 (William Smith, ed., 3d Am. ed. 1857) (“[T]he murderer of a parent was sewed up in a sack (*culeus* or *culleus*) and thrown into a river”; “He who killed a father or mother, grandfather or grandmother, was punished . . . by being whipped till he bled, sewn up in a sack with a dog, cock, viper, and ape, and thrown into the sea if the sea was at hand, and if not, by a constitution of Hadrian, he was exposed to wild beasts, or, in the time of Paulus, to be burned.”); JOHN D. BESSLER, CRUEL AND UNUSUAL, *supra* note 137, at 267 (discussing the punishment for parricide).

320. KATHERINE E. WELCH, THE ROMAN AMPHITHEATRE: FROM ITS ORIGINS TO THE COLOSSEUM 145–46 (2007).

321. *Id.*

322. NATHAN T. ELKINS, A MONUMENT TO DYNASTY AND DEATH: THE STORY OF ROME’S COLOSSEUM AND THE EMPERORS WHO BUILT IT 3 (2019) (“The Flavian Amphitheater, probably called simply the *amphitheatrum* by the Romans, became known as the Colosseum in the Middle Ages and still popularly bears that name. It was the largest and grandest of all amphitheaters in the Roman Empire, with some strikingly modern amenities that foreshadowed today’s sports stadiums. . . . The Colosseum also has elaborate substructures that would have allowed an army of slaves and servicemen to raise gladiators, animals, stage props, and scenery efficiently and dramatically to the arena floor above.”); *id.* (“According to modern estimates, the Colosseum could seat 50,000 to 55,000 spectators, although an ancient source, the Chronographer of 354 CE, states that it could accommodate 87,000.”).

323. *Id.* at 97 (“[E]xecutions took many different forms and were never monotonous. Condemned criminals could be shackled together and forced to fight to the death, covered in flammable substances and set alight, placed on an iron chair and fried, or dismembered by horses.”); *id.* at 95 (“Other forms of execution included forcing the condemned to fight in

and *damnatio ad bestias*, “condemnation to the beasts.”<sup>324</sup> Humiliation and mocking of the offender were a regular part of such horrific Roman public spectacles.<sup>325</sup>

Other political leaders, from Robespierre<sup>326</sup> and Napoleon in France,<sup>327</sup> to those involved in the Armenian genocide,<sup>328</sup> to Joseph

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mock naval battles in the *naumachiae*, crucifixion, and burning alive. Crucifixions, a punishment particularly favored for use on slaves, often took place in entertainment venues, including amphitheaters, as indicated by a painted advertisement at Pompeii that publicized games in Cumae: ‘twenty pairs of gladiators, crucifixions, a hunt, and awnings.’”).

324. *Id.* at 95 (“[E]xecutions of condemned criminals took place at midday, the *meridianum spectaculum*. At this time, respectable citizens, prior to the gladiatorial combats in the afternoon, might retire from the amphitheater for a break and perhaps have lunch outside the arena. Nonetheless, many spectators stayed for the particularly gruesome events.”); *see also id.* (noting of *damnatio ad bestias*: “This Roman form of execution is familiar to many modern people through early Christian martyr tales, such as that of Perpetua and Felicitas, who are said to have been thrown to the beasts in the amphitheater at Carthage, located in modern Tunisia.”); *id.* (“In the Colosseum, executions incorporated *damnatio ad bestias*, *damnatio ad flammās*, crucifixion, or some combination thereof, although they were often staged as mythological enactments, or what Coleman calls ‘fatal charades.’”). As Nathan Elkins writes in his history of the Colosseum:

In the Roman penal system, one could be condemned to a gladiator school or a hunting school (*damnatio ad ludum gladiatorium* or *damnatio ad ludum venatorium*). Condemnation to train as a gladiator or *venator* was a merciful punishment when compared with *damnatio ad bestias*, *damnatio ad flammās*, or crucifixion, as it allowed a chance for survival and hope to buy or win one’s eventual freedom.

*Id.* “The worst punishments were the *summa supplicia* (highest punishments), brutal executions that included no hope for survival.” *Id.* at 96.

325. *Compare id.* at 96 (“Typically, citizens condemned to death would face swifter, less agonizing, and less humiliating deaths in a private setting. For a citizen, capital punishment was typically beheading (*damnatio ad gladium*, ‘condemnation to the sword’).”) *with id.* (“Noncitizens, usually slaves or foreigners, who were condemned to die in brutal and humiliating ways were called *noxii* (singular: *noxius*), ‘convicted criminals’; they might also be called *damnati* (singular: *damnatus*), ‘condemned.’”).

326. LIVES AND LEGACIES: AN ENCYCLOPEDIA OF PEOPLE WHO CHANGED THE WORLD – GOVERNMENT LEADERS, MILITARY RULERS, AND POLITICAL ACTIVISTS 156 (David W. Del Testa ed., 2001) (noting that nearly 20,000 people were executed by guillotine during the French Revolution’s Reign of Terror after Maximilien Robespierre, the leader of the Jacobins, gained control of the government in the fall of 1793, with Robespierre himself ultimately guillotined on July 28, 1794).

327. *E.g.*, Frédéric Régent, *Slavery and the Colonies*, in A COMPANION TO THE FRENCH REVOLUTION 398 (Peter McPhee ed., 2015) (“Napoleon Bonaparte maintained slavery in colonies where it had not been abolished (Martinique, Mascareignes) and reestablished it in Guadeloupe and Guyane in 1802.”); DAVID P. JORDAN, NAPOLEON AND THE REVOLUTION 57-58 (2012) (taking note of summary executions carried out at Napoleon’s directions).

328. CLAUDIA MOSCOVICI, HOLOCAUST MEMORIES: A SURVEY OF HOLOCAUST MEMOIRS, HISTORIES, NOVELS, AND FILMS xii (2019) (“The genocide involved the systematic mass murder and ethnic cleansing of approximately 1.5 million Armenians by the Ottoman Turks during World War I. The extermination started on April 24, 1915, with the deportation and execution of a few hundred Armenian intellectuals from Constantinople.”).

Stalin of Soviet Union<sup>329</sup> and Adolf Hitler in Nazi Germany,<sup>330</sup> to Pol Pot and the Khmer Rouge in Cambodia<sup>331</sup> and Saddam Hussain's regime in Iraq,<sup>332</sup> have engaged in the most grotesque atrocities and abuses of power. Torture has been employed for centuries,<sup>333</sup> with techniques including waterboarding,<sup>334</sup> the rack,<sup>335</sup> and the thumbscrew.<sup>336</sup> Dr. Josef Mengele, the infamous Nazi doctor, performed horrific medical experiments on Jews and Gypsies at Auschwitz,<sup>337</sup> and innumerable state-sanctioned and summary executions have been carried out over the centuries.<sup>338</sup> There have been more than 15,000 executions on American

329. NORMAN M. NAIMARK, *STALIN'S GENOCIDES 2* (2011) ("As the result of Stalin's rule in the 1930s and early 1940s, many millions of innocent people were shot, starved to death, or died in detention and exile.").

330. JEREMY BLACK, *THE HOLOCAUST: HISTORY & MEMORY* 13 (2016) (describing Hitler's hatred of Jews and his book, *Mein Kampf* (*My Struggle*), which Hitler had composed in 1924 and which Germans were expected to read under the Nazi regime after Hitler came to power in 1933); Steve Hunegs, *On Holocaust Remembrance Day, Americans must commit to remembering*, STAR TRIBUNE (Jan. 24, 2020, 6:05 PM), <https://www.startribune.com/on-holocaust-remembrance-day-americans-must-commit-to-remembering/567277872/> ("At Auschwitz, the Nazis and their collaborators murdered 1.1 million people—90% of whom were Jews, as well as some tens of thousands of Poles, Roma, and Soviet POWs. One statistic illustrates the grotesque efficiency and single-minded commitment of the Nazis to kill every Jew on earth. Despite the D-Day landings and the increasingly perilous situation for the German army on the eastern front, between May and July 1944, the Nazis murdered 12,000 Hungarian Jews per day.").

331. BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79*, at ix (3d ed. 2008) (noting that the Khmer Rouge regime "presided over the deaths of about 1.7 million Cambodians, ethnic minorities, and citizens of neighboring countries" during a "four-year reign of terror").

332. THOMAS R. MOCKAITIS, *VIOLENT EXTREMISTS: UNDERSTANDING THE DOMESTIC AND INTERNATIONAL TERRORIST THREAT* 114 (2019) ("Despite its being outlawed, poison gas has been used in recent history. On March 16, 1988, Saddam Hussain used poised gas against the Kurdish town of Halabja in northern Iraq, killing at least 5,000 men, women, and children. Airplanes dropped canisters containing mustard gas and nerve agents such as sarin, tabun, and VX. Nerve agents attack the central nervous system, causing the failure of vital bodily functions such as breathing.").

333. See generally EDWARD PETERS, *TORTURE* (expanded ed. 1999) (tracing the history of the use of torture from ancient Greece and Rome through modern times); see also DARIUS REJALI, *TORTURE AND DEMOCRACY* 4 (2007) (noting that "[t]here is a long, unbroken, though largely forgotten history of torture in democracies at home and abroad").

334. CULLEN MURPHY, *GOD'S JURY: THE INQUISITION AND THE MAKING OF THE MODERN WORLD* 92 (2012).

335. DAVID JARDINE, *A READING ON THE USE OF TORTURE IN THE CRIMINAL LAW OF ENGLAND PREVIOUSLY TO THE COMMONWEALTH* 6-7, 19, 23-24 (1837).

336. JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME* 19-21 (2006).

337. HISTORY.COM EDITORS, *Josef Mengele, known as the "Angel of Death," dies*, HISTORY.COM (Feb. 4, 2021), <https://www.history.com/this-day-in-history/the-angel-of-death-dies>.

338. EDWARD LAWSON, *ENCYCLOPEDIA OF HUMAN RIGHTS* 192 (2d ed. 1991) ("In 1981, the General Assembly expressed (resolution 37/182) its alarm at the occurrence on a large scale of summary or arbitrary executions, including extralegal executions, condemned that

soil,<sup>339</sup> and the Equal Justice Initiative has meticulously documented more than 4,000 extra-judicial, racial terror lynchings.<sup>340</sup> Many of those lynchings were never properly investigated by governmental officials, with perpetrators thereby evading justice and leading to reports that the acts had been committed “at the hands of persons unknown.”<sup>341</sup> In addition, civil rights leaders have been surveilled,<sup>342</sup> jailed,<sup>343</sup> and beaten

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practice, and welcomed the appointment by the Economic and Social Council of a Special Rapporteur to examine the question and to report to the Commission on Human Rights.”); *see also id.* (noting that, in 1983, Special Rapporteur S. A. Wako, of Kenya, defined a *summary execution* as “the arbitrary deprivation of life as a result of a sentence imposed by the means of summary procedure in which the due process of law and in particular the minimum procedural guarantees as set out in article 14 of the International Covenant on Civil and Political Rights are either curtailed, distorted, or not followed”; an *arbitrary execution* as “the arbitrary deprivation of life as the result of the killing of persons carried out by the order of a government or with its complicity or tolerance or acquiescence without any judicial or legal process”; and an *extralegal execution* as a killing “committed outside the judicial or legal process, and at the time illegal under relevant national or international laws”).

339. *Executions in the U.S. 1608–2002: The Espy File*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/executions-in-the-u-s-1608-2002-the-espy-file> (last visited Feb. 13, 2021) (“The ‘Espy File’ is a database of executions in the United States and the earlier colonies from 1608 to 2002. This list of 15,269 executions was compiled by M. Watt Espy and John Ortiz Smykla, and was made available through the Inter-University Consortium for Political and Social Research.”).

340. In the nineteenth and twentieth centuries, lynchings took place with considerable frequency in the United States. *See generally* ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950* (1980); *see generally* CHRISTOPHER WALDREP, *AFRICAN AMERICANS CONFRONT LYNCHING: STRATEGIES OF RESISTANCE FROM THE CIVIL WAR TO THE CIVIL RIGHTS ERA* (2009); *see generally* PAULA J. GIDDINGS, *IDA – A SWORD AMONG LIONS: IDA B. WELLS AND THE CAMPAIGN AGAINST LYNCHING* (2008); *see also* JOHN D. BESSLER, *LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA 183-224, 231-32, 232 n.5, 298* (2003) (documenting and discussing the history of lynchings in one locale, the NAACP’s anti-lynching campaign, and the definitions of *lynching* put forth in various sources). The Equal Justice Initiative, led by Bryan Stevenson, has documented 4,084 “racial terror lynchings” of Black Americans from 1877 to 1950 in the South. EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 4 (3d ed. 2017); Kathy Roberts Forde, *Afterword: Ida B. Wells-Barnett and the ‘Racist Cover-Up’*, in *POLITICAL PIONEER OF THE PRESS: IDA W. WELLS-BARNETT AND HER TRANSNATIONAL CRUSADE FOR SOCIAL JUSTICE* 176 (Lori Amber Roessner & Jodi L. Rightler-McDaniels eds., 2018).

341. *See, e.g.*, PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* 380 (2007).

342. ANDREW YOUNG & KABIR SEHGAL, *WALK IN MY SHOES: CONVERSATIONS BETWEEN A CIVIL RIGHTS LEGEND AND HIS GODSON ON THE JOURNEY AHEAD* 65-66 (2010) (noting that J. Edgar Hoover, the first FBI director, authorized surveillance of civil rights leaders, including Dr. Martin Luther King Jr.).

343. Larisa Epatko, *How Nelson Mandela Survived His Years in Isolated South African Jail*, PBS NEWS HOUR (July 18, 2013, 9:00 AM), <https://www.pbs.org/newshour/world/nelson-mandela-1> (noting that Nelson Mandela, the anti-apartheid activist and former South African president, “was imprisoned for 27 years, 18 of those on Robben Island, a rock quarry off the coast of Cape Town” and observing how “Mandela and the other prisoners were completely isolated, got little to eat and had to undertake the grueling work of pounding rocks into gravel”); KEITH WATKINS, *THE*

up<sup>344</sup>—even killed<sup>345</sup>—for their efforts to fight inequality and social and racial injustices.<sup>346</sup>

In the twenty-first century, abuses of power continue. North Korean dictator Kim Jong Un has ordered public executions by firing squad,<sup>347</sup> even reportedly using anti-aircraft guns to put people to death.<sup>348</sup> Russian President Vladimir Putin, the Kremlin, and its allies have

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AMERICAN CHURCH THAT MIGHT HAVE BEEN: A HISTORY OF THE CONSULTATION ON CHURCH UNION 58 (2014) (“In 1963, a proposed conference by the Southern Christian Leadership Conference led to confrontation in which Martin Luther King Jr., along with others, was imprisoned and where he drafted his ‘Letter from a Birmingham Jail.’”).

344. Athena Jones, *Selma 50 years later: John Lewis’s memories of the march*, CNN (Mar. 6, 2015, 7:41 PM), <https://www.cnn.com/2015/03/06/politics/selma-50-years-john-lewis-bridge-anniversary/index.html> (“Fifty years ago this weekend, a 25-year-old John Lewis was beaten so badly by Alabama state troopers that they fractured his skull. Lewis calls the Edmund Pettus Bridge—where the troopers and a group of white men deputized into a posse by the sheriff attacked hundreds of peaceful protestors on Bloody Sunday, March 7, 1965—an ‘almost holy place.’”).

345. SYLVIE LAURENT, *KING AND THE OTHER AMERICA: THE POOR PEOPLE’S CAMPAIGN AND THE QUEST FOR ECONOMIC EQUALITY* 3-4 (2018) (noting the assassination of Martin Luther King, Jr. just weeks before the start of the Poor People’s Campaign).

346. MINROSE GWIN, *REMEMBERING MEDGAR EVERS: WRITING THE LONG CIVIL RIGHTS MOVEMENT* 1, 37 (2013) (taking note the assassinations of human rights and civil rights leaders).

347. E.g., Steven Brown, *North Korea horror: Kim orders public executions of six people over high-class sex ring*, EXPRESS (Aug. 14, 2020, 9:36 PM), <https://www.express.co.uk/news/world/1323070/north-korea-news-kim-jong-un-execution-sex-ring-prostitution>; Mark Hodge, *Kim’s Kill Zone: Truth behind ‘Bond villain’ Kim Jong-un’s brutal executions. . . from piranhas to anti-aircraft guns and devil dogs*, U.S. SUN (Apr. 29, 2020, 9:46 PM), <https://www.the-sun.com/news/755387/kim-jong-un-executions-piranhas-anti-aircraft-guns/>.

348. Jon Sharman, *North Korean defector ‘forced to watch 11 musicians executed with anti-aircraft guns’*, INDEPENDENT (Sept. 21, 2017, 4:19 PM), <https://www.independent.co.uk/news/world/asia/north-korea-defector-anti-aircraft-guns-execution-kim-jong-un-killed-sex-slaves-pyongyang-porn-film-video-a7959851.html> (“Kim Jong-un had 11 musicians executed with anti-aircraft guns and orders aides to pick out sex slaves from North Korea’s schools, a defector has claimed.”); Callum Paton, *Flamethrower Execution, Death Camps and Famine: North Korea’s Gruesome Human Rights Abuses*, NEWSWEEK (Feb. 26, 2019, 10:39 AM), <https://www.newsweek.com/flamethrower-execution-death-camps-and-famine-north-koreas-gruesome-rights-1344039> (“In May 2015, Reuters reported that the head of the North Korean military was executed by anti-aircraft guns. Hundreds reportedly watched the execution of Hyon Yong Chol who stood accused of treason including disobeying Kim and falling asleep during a military parade, according to the South Korean intelligence services.”).

repeatedly resorted to disinformation campaigns,<sup>349</sup> poisoning,<sup>350</sup> and extrajudicial killing of political opponents and those in exile,<sup>351</sup> while officials of the Kingdom of Saudi Arabia, where amputations, beheadings, eye gougings, floggings, and stonings still take place,<sup>352</sup>

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349. See Deirdre Shesgreen, *Russia, Iran aimed to sway 2020 election through covert campaigns, US intelligence reports*, USA TODAY (Mar. 16, 2021, 7:16 PM), <https://www.usatoday.com/story/news/politics/elections/2021/03/16/us-intel-report-russia-iran-tried-sway-2020-presidential-election/4720051001/>; Michael R. Gordon & Dustin Volz, *Russian Disinformation Campaign Aims to Undermine Confidence in Pfizer, Other Covid-19 Vaccines, U.S. Officials Say*, WALL ST. J. (Mar. 7, 2021, 10:00 AM), <https://www.wsj.com/articles/russian-disinformation-campaign-aims-to-undermine-confidence-in-pfizer-other-covid-19-vaccines-u-s-officials-say-11615129200>; Bobby Allyn, *Study Exposes Russia Disinformation Campaign That Operated In The Shadows For 6 Years*, NPR (June 16, 2020, 2:36 PM), <https://www.npr.org/2020/06/16/878169027/study-exposes-russia-disinformation-campaign-that-operated-in-the-shadows-for-6->.

350. See, e.g., Jaclyn Diaz, *Russian Agents Trailed Opposition Leader Navalny Before Poisoning, Report Finds*, NPR (Dec. 16, 2020 7:03 AM), <https://www.npr.org/2020/12/16/947024703/russian-agents-trailed-opposition-leader-navalny-before-poisoning-report-finds>; see also Colin Dwyer, *Vladimir Putin Shrugs Off Alexei Navalny's Poisoning: 'Who Needs Him?'*, NPR (Dec. 17, 2020, 9:10 AM), <https://www.npr.org/2020/12/17/947460586/putin-shrugs-off-navalny-poisoning>; see also Tim Lister et al., *Russian opposition leader Alexey Navalny dupes spy into revealing how he was poisoned*, CNN (Dec. 21, 2020, 2:47 PM), <https://www.cnn.com/2020/12/21/europe/russia-navalny-poisoning-underpants-ward/index.html>.

351. See Vladimir Kara-Murza, Opinion, *The world must pay attention to the suspected poisoning of Alexei Navalny. My own case shows why*, WASH. POST (Aug. 21, 2020, 10:12 AM), <https://www.washingtonpost.com/opinions/2020/08/21/world-must-pay-attention-suspected-poisoning-alexei-navalny-my-own-case-shows-why/>; see also Dave Davies, *In New Book, Journalist Alleges Russian Links To Mysterious Deaths Abroad*, NPR (Nov. 19, 2019, 1:17 PM), <https://www.npr.org/2019/11/19/780759713/in-new-book-journalists-alleges-russian-links-to-mysterious-deaths-abroad>; Boris Nemtsov: *Russians march in memory of slain Putin opponent*, BBC NEWS (Feb. 29, 2020), <https://www.bbc.com/news/world-europe-51690027>; Matt Schiavenza, *The Assassination of Boris Nemtsov: More a Shock Than a Surprise*, ATLANTIC (Feb. 28, 2015), [https://www.theatlantic.com/international/archive/2015/02/putins-power-unchallenged-by-murder/386480/?gclid=CjwKCAjwm\\_P5BRAhEiwAwRzSO-ZKaqo-LdKR8HqWciq3NTMdoPgDLTaPHqBD\\_B1xUkkcUOSWRZJ3lBoCL48QAvD\\_BwE](https://www.theatlantic.com/international/archive/2015/02/putins-power-unchallenged-by-murder/386480/?gclid=CjwKCAjwm_P5BRAhEiwAwRzSO-ZKaqo-LdKR8HqWciq3NTMdoPgDLTaPHqBD_B1xUkkcUOSWRZJ3lBoCL48QAvD_BwE); see also Daniel Ofman, *'Putin is obsessed with the idea of legitimacy,' opposition activist says of 'sham' referendum*, WORLD (July 1, 2020, 2:15 PM), <https://www.pri.org/stories/2020-07-01/putin-obsessed-idea-legitimacy-opposition-activist-says-sham-referendum>.

352. See KAYE STEARMAN, THE DEBATE ABOUT THE DEATH PENALTY 24 (2008) (“The government of Saudi Arabia beheads people, and hangings and stonings have been used in Iran.”); see also Charles Davis, *Saudi Arabia breaks its own record for executions, beheading over 180 people in 2019*, BUS. INSIDER (Apr. 20, 2020, 9:22 PM), <https://www.businessinsider.com/saudi-arabia-sets-record-beheading-over-180-people-in-2019-2020-4>; see also Tariq Tahir, *EYE FOR AN EYE Saudi Arabia executions – paralysis, eye gouging and crucifixion among the medieval punishments faced by kids as young as 14*, SUN (Apr. 26, 2019, 9:30 AM), <https://www.thesun.co.uk/news/6980209/saudi-arabia-executions-eye-gouging-crucifixion/> (describing methods of punishment in Saudi Arabia and reporting that in April 2019 “a horrific mass execution was carried out by the savage regime involving 37 men being killed including one being crucified and another having his head impaled on a spike.”).



notoriously ordered and carried out the killing and dismemberment of dissident and *Washington Post* columnist Jamal Khashoggi.<sup>353</sup> Syria's regime, led by a brutal tyrant, Bashar al-Assad, the son of another tyrannical ruler, Hafez al-Assad,<sup>354</sup> resorted—like his father before him—to the use of chemical weapons,<sup>355</sup> also ordering the bombing and killing of civilians, including scores of children, throughout the country's ongoing, ten-year-long civil war.<sup>356</sup> Dictators and

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353. *Jamal Khashoggi: All you need to know about Saudi journalist's death*, BBC NEWS (Feb. 24, 2021), <https://www.bbc.com/news/world-europe-45812399>; U.S. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, ASSESSING THE SAUDI GOVERNMENT'S ROLE IN THE KILLING OF JAMAL KHASHOGGI (2021); Melissa Macaya et al., *Intelligence report on Jamal Khashoggi's murder released*, CNN WORLD (Feb. 26, 2021, 6:14 PM), <https://www.cnn.com/middleeast/live-news/jamal-khashoggi-murder-us-intelligence-report/index.html>; see also Alex Marquardt, *To punish Saudi Arabia with the "Khashoggi Ban," Biden mirrored a plan developed under Trump*, CNN (Mar. 10, 2021, 1:40 PM), <https://www.cnn.com/2021/03/10/politics/biden-khashoggi-ban-mirrored-trump-plan/index.html> ("When the Biden administration announced a ban on dozens of Saudis from traveling to the US in response to intelligence that the kingdom's powerful crown prince, Mohammed bin Salman, had approved the murder of journalist Jamal Khashoggi, it was rolling out a plan that had been spiked by the Trump administration and brought back to life once President Joe Biden took office.").

354. Hafez al-Assad, a former Syrian air force commander and minister of defense, seized power in Syria through a coup in 1970 and was the president of Syria from 1971 to 2000. WORLD OF INFO., MIDDLE EAST REVIEW 2003/04: THE ECONOMIC AND BUSINESS REPORT 202 (27th ed. 2003). During that time, many atrocities were perpetuated. THOMAS L. FRIEDMAN, FROM BEIRUT TO JERUSALEM 77 (1989) (noting that Amnesty International, in a November 1983 report on Syria, estimated that from 10,000 to 25,000 people, mostly civilians, were killed in Hama during the regime of President Hafez al-Assad).

355. THE PROPHETS: FORTRESS COMMENTARY ON THE BIBLE STUDY EDITION 687 (Gale A. Yee et al. eds., 2016) ("In one attack on August 21, 2013, over 1,400 Syrian civilians, including women and children, were killed in a gas attack apparently launched by the Syrian army. The Assad regime has responded by claiming that the attack was carried out by the Syrian rebels, but the rebels lack access to such weapons and the means to deliver them."); Eyal Zisser, *The Syrian Government's War against Its People*, in THE SYRIAN WAR: BETWEEN JUSTICE AND POLITICAL REALITY 71 (Hilly Moodrick-Even Khen et al. eds., 2020) ("On the morning of 4 April 2017, Syrian air force planes launched a chemical attack on the northern town of Khan Shaykhun in Idlib province. Reports indicated the Syrian attackers had used sarin gas and killed over a hundred residents of the town, injuring several hundred more; most of the victims were women and children.").

356. See CNN Editorial Research, *Syrian Civil War Fast Facts*, CNN (Apr. 9, 2020, 10:05 AM), <https://www.cnn.com/2013/08/27/world/meast/syria-civil-war-fast-facts/index.html> ("In the first five years of the war, which began in 2011, an estimated 400,000 Syrians were killed, according to the UN Envoy for Syria."); see also *id.* ("As of April 2020, roughly 5.6 million Syrians have fled the country, according to the UN High Commissioner for Refugees, and more than 6.2 million people are displaced internally."); see also AFP & DPA, *Pro-Iran Fighters Reported Killed In Israeli Strikes In Syria*, RADIOFREEEUROPE RADIOLIBERTY (Nov. 25, 2020, 10:44 AM), <https://www.rferl.org/a/pro-iran-fighters-reported-killed-in-israeli-strikes-in-syria/30968311.html> (noting that Syria's civil war "began with a crackdown on anti-government protesters in March 2011" and that "[m]ore than 400,000 people have since been killed and millions displaced"); accord Gul Tuysuz, *Children bearing the brunt of latest escalation in Syrian civil war*, CNN WORLD (Feb. 2, 2020, 3:23 AM), <https://www.cnn.com/2020/02/02/world/syria-idlib-children/index.html>; Susie Linfield,

authoritarian regimes across the globe, in fact, have systematically violated people's rights (e.g., North Korea's use of torture and forced labor camps,<sup>357</sup> the Chinese crackdown on dissenters in Hong Kong, and the Russian Federation's complicity in shooting down a Malaysia Airlines passenger plane over Ukraine killing 298 passengers and crew).<sup>358</sup>

Abuses of power and failures to promote and respect human rights take many forms. Former President Donald Trump, for example, repeatedly thumbed his nose at the Rule of Law,<sup>359</sup> continually glorified

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*Syria's Torture Photos: Witness to Atrocity*, N.Y. REV. (Feb. 9, 2019), <https://www.nybooks.com/daily/2019/02/09/syrias-torture-photos-witness-to-atrocity/>.

357. See, e.g., KEVIN DOOLEY & JOSEPH PATTEN, *WHY POLITICS MATTERS: AN INTRODUCTION TO POLITICAL SCIENCE* 57 (3d ed. 2020) ("North Korean leader Kim Jong Un currently has approximately 130,000 political prisoners detained in North Korean gulags. In 2019, the nongovernmental organization (NGO) Freedom House ranked North Korea as one of the most brutal governments in the world because of its propensity to torture citizens perceived to be a political threat to its leader. One recent report by the War Crimes Committee of the International Bar Association concluded that the level of barbarism in North Korea has 'no parallel in the contemporary world.' Another report stated that prisoners in the gulag are forced to work twelve- to fifteen-hour days, until they generally die of malnutrition. Detainees in the gulag mostly eat a diet of corn and salt, lose their teeth, have their gums turn black, 'their bones weaken and, as they age, they hunch over at the waist.' It is estimated that hundreds of thousands of North Korean detainees have already perished in these camps since they were created by the current North Korean leader's grandfather Kim Il-sung in 1958."). Freedom House, a non-profit founded on the belief that "freedom flourishes in democratic nations where governments are accountable to their people," annually evaluates the strength of the Rule of Law in nations around the globe to produce its annual report, *Freedom in the World. About Us*, FREEDOM HOUSE, <https://freedomhouse.org/about-us> (last visited Feb. 20, 2021). As part of its assessment, it looks at the following aspects of the Rule of Law in a given locale: "Is there an independent judiciary?" "Does due process prevail in civil and criminal matters?" "Is there protection from the illegitimate use of physical force and freedom from war and insurgencies?" and "Do laws, policies, and practices guarantee equal treatment of various segments of the population?" *Freedom in the World Research Methodology*, FREEDOM HOUSE, <https://freedomhouse.org/reports/freedom-world/freedom-world-research-methodology> (last visited Feb 20, 2021).

358. *North Korea: Systematic Repression*, HUM. RTS. WATCH (Jan. 14, 2020, 2:55 PM), <https://www.hrw.org/news/2020/01/14/north-korea-systematic-repression>; Michael Peel, Joe Leahy & Ben Hall, *Global allies step up retaliation for China crackdown in HK*, FIN. TIMES (July 9, 2020), <https://www.ft.com/content/3fedcc2c-8636-4ad4-a5bb-7584b0dc2f66>; *MH17: Four charged with shooting down plane over Ukraine*, BBC NEWS (June 19, 2019), <https://www.bbc.com/news/world-europe-48691488>.

359. See generally Joan Biskupic, *Trump's unbroken pattern of disdain for the rule of law*, CNN POLITICS (Feb. 22, 2020, 11:48 AM), <https://www.cnn.com/2020/02/22/politics/trump-justice-barr-rule-of-law/index.html> ("President Donald Trump's actions this week attacking the US justice system are stunning only in how much they conform to a three-year pattern . . . . Since his early days in office, Trump has scorned legal norms and the men and women who carry them out. He publicly mocked federal judges, derided the criminal justice system as a 'laughingstock' and used his first presidential pardon on Sheriff Joe Arpaio, convicted of criminal contempt."); see generally Peter L. Strauss, *The Trump Administration and the Rule of Law* 433, 436 (Columbia Law Sch. Ctr. on Glob. Governance, Working Paper No. 170, 2019),

violence,<sup>360</sup> embraced authoritarian and totalitarian leaders,<sup>361</sup> regularly attacked and tried to intimidate journalists and federal judges,<sup>362</sup> routinely spoke of accurate reporting as “fake news,”<sup>363</sup> and grossly abused human rights throughout his presidency.<sup>364</sup> His repeated lies and

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[https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3601&context=faculty\\_scholarship](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3601&context=faculty_scholarship) (“President Trump appears to believe that he has the right monarchically to command all domestic government.”).

360. See, e.g., Alex Hern, *Twitter hides Donald Trump tweet for ‘glorifying violence’*, GUARDIAN (May 29, 2020, 12:57 PM), <https://www.theguardian.com/technology/2020/may/29/twitter-hides-donald-trump-tweet-glorifying-violence>.

361. See Ramsey Touchberry, *‘We Have a Certain Chemistry’: All the Praise Donald Trump Lavished Upon Kim, Putin and MBS at G20 and Abroad*, NEWSWEEK (July 1, 2019, 12:24 PM), <https://www.newsweek.com/trump-putin-g20-kim-mbs-relationship-1446873> (“The praise levied by Trump to Russia’s Vladimir Putin, Saudi Arabia’s Mohammad bin Salman and North Korea’s Kim Jong-un was similar to that of which he’s made in the past, where he again refused to publicly condemn certain leaders for taking hostile actions toward American people or interests and boasted of his personal connections with the men.”); accord Krishnadev Calamur, *Nine Notorious Dictators, Nine Shout-Outs From Donald Trump*, ATLANTIC (Mar. 4, 2018), <https://www.theatlantic.com/international/archive/2018/03/trump-xi-jinping-dictators/554810/>.

362. E.g., Ashley Pratte, Opinion, *Trump 2020 Plan: New threats to press freedom and trust in media, pillars of our democracy*, USA TODAY (Sept. 7, 2019, 4:00 AM), <https://www.usatoday.com/story/opinion/2019/09/07/trump-2020-plan-new-risks-press-freedom-trust-in-media-column/2231149001/> (noting that Trump called the press “truly the ENEMY OF THE PEOPLE” in a Tweet, and observing: “It is important to remember that leadership comes from the top and America currently has a president who advocates for ‘body slamming’ reporters, mocks and ridicules mainstream media networks and their anchors, calls the media the ‘enemy of the American people’ . . . .”); Michael Conway, *Trump’s Twitter attacks on Judge Amy Berman Jackson show his disrespect for the rule of law*, NBC NEWS (Feb. 19, 2020, 1:31 AM), <https://www.nbcnews.com/think/opinion/trump-s-twitter-attacks-judge-amy-berman-jackson-show-his-ncna1138406> (“President Donald Trump’s repeated attempts to improperly influence federal judges in pending criminal cases and misuse the Justice Department to protect cronies accused of crimes has been audacious enough that it prompted the Federal Judges Association to schedule an emergency meeting of its executive committee on Wednesday morning and more than 2,000 former Justice Department officials from both parties to call for the resignation of Attorney General William Barr.”).

363. See, e.g., Uri Friedman, *The Real-World Consequences of ‘Fake News’*, ATLANTIC (Dec. 23, 2017), <https://www.theatlantic.com/international/archive/2017/12/trump-world-fake-news/548888/> (“The term ‘fake news’ emerged, in the context of the 2016 U.S. presidential election, as a reference to the deliberately false stories that Russian government propagandists and assorted troublemakers around the world were spreading on Facebook and other social-media platforms to help or harm a particular candidate, sow chaos, or simply make a quick buck. . . . [I]n specifically repurposing the term ‘fake news,’ and conflating unfavorable journalism with disinformation, Trump is arguing that journalists maliciously fabricate the sources and substance of their reporting—at least when what they report doesn’t reflect well on him. By persistently hurling the fake-news put-down at nearly all the country’s leading news organizations, he is refashioning a vital democratic institution—the independent press—as an enemy.”).

364. See AMNESTY INT’L, UNITED STATES OF AMERICA 2020, <https://www.amnesty.org/en/countries/americas/united-states-of-america/report-united-states-of-america/> (last visited Feb. 20, 2021) (“In 2019, the Trump administration launched discriminatory attacks, through both policy and practice, against the human rights of some of

misrepresentations are well documented,<sup>365</sup> prompting one journalist, S.V. Dáte, to pointedly ask President Trump at a White House press briefing in August of 2020: “Mr. President, after three and a half years, do you regret at all, all the lying you’ve done to the American people?”<sup>366</sup> “As long as the president embraces autocrats and dictators, expressing envy of their ability to silence or compromise the democratically essential checks and balances on their authority,” Kenneth Roth, the Human Rights Watch executive director, testified about Donald Trump on January 10, 2020 before the U.S. State Department’s Commission on Unalienable Rights, “the US government will have little credibility on human rights.”<sup>367</sup>

Donald Trump’s repeated abuses of power included soliciting foreign interference in a U.S. presidential election,<sup>368</sup> separating children from their parents at the U.S.-Mexico border,<sup>369</sup> keeping immigrant kids

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the most vulnerable individuals and communities in the USA. At the national and international levels, the US government sought to narrow human rights protections for sexual and reproductive rights and protections against discrimination for lesbian, gay, bisexual, transgender and intersex (LGBTI) people and others. At the US-Mexico border, in violation of national and international laws, the US authorities detained, ill-treated and turned away tens of thousands of asylum-seekers who requested international protection. As a result, unaccompanied children, families, LGBTI people and others faced abuses once stranded in northern Mexico as well as in US immigration detention centres. The Trump administration also increasingly misused the criminal justice system to threaten and harass human rights defenders, political opponents, whistleblowers and others.”).

365. See Chris Cillizza, *Here’s the most incredible thing about Donald Trump’s problem with facts*, CNN POLITICS (July 21, 2020, 1:01 PM), <https://www.cnn.com/2020/07/14/politics/donald-trump-fact-checker-lies-washington-post/index.html> (“With six months left on his first term in office, President Donald Trump has said more than 20,000 things that aren’t true, according to the Washington Post’s Fact Checker team.”).

366. Helen Sullivan, *‘Do you regret all your lying?’ White House reporter’s question startles Trump*, GUARDIAN (Aug. 13, 2020, 10:27 PM), <https://www.theguardian.com/us-news/2020/aug/14/do-you-regret-all-your-lying-white-house-reporters-question-startles-trump>.

367. US: *‘Unalienable Rights’ Commission Risks Rights Protections*, HUM. RTS. WATCH (Jan. 10, 2020, 1:15 PM), <https://www.hrw.org/news/2020/01/10/us-unalienable-rights-commission-risks-rights-protections>.

368. Zachary B. Wolf & Sean O’Key, *The Trump-Ukraine impeachment inquiry report, annotated*, CNN POLITICS (Dec. 3, 2019), <https://www.cnn.com/interactive/2019/12/politics/trump-ukraine-impeachment-inquiry-report-annotated/>.

369. Julia Ainsley & Jacob Soboroff, *Trump Cabinet officials voted in 2018 White House meeting to separate migrant children, say officials*, NBC NEWS (Aug. 20, 2020, 12:15 PM), <https://www.nbcnews.com/politics/immigration/trump-cabinet-officials-voted-2018-white-house-meeting-separate-migrant-n1237416>; Richard Gonzales, *New Report: U.S. Lacked Technology to Account for Separated Families*, NPR (Nov. 27, 2019, 10:49 PM), <https://www.npr.org/2019/11/27/783513721/new-report-says-u-s-lacked-technology-to-account-for-separated-families>.

in cages,<sup>370</sup> using the executive clemency power to pardon friends, political cronies and even war crimes,<sup>371</sup> inciting and exalting violence,<sup>372</sup> and misleading the American people about the true nature and danger of the COVID-19 pandemic,<sup>373</sup> thus exponentially increasing sickness and death.<sup>374</sup> In recounting a conversation with Chinese President Xi Jinping, Trump told *Washington Post* journalist Bob Woodward on February 7, 2020, that the coronavirus is “more deadly than your, you know, your—even your strenuous flus.” “[T]his is deadly

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370. U.S. COMM’N ON CIVIL RIGHTS, TRAUMA AT THE BORDER: THE HUMAN COST OF INHUMANE IMMIGRATION POLICIES 57 (2019), <https://www.usccr.gov/pubs/2019/10-24-Trauma-at-the-Border.pdf> (“While the number of minors detained has reached a record high, the conditions in which they are housed has hit a disturbingly low standard. Thousands of children have been held by Department of Homeland Security in cages in former warehouses, in buildings with little if any natural light, forced to sleep on cement floors in cold temperatures, with only aluminum blankets issued to cover them.”).

371. Matthew S. Schwartz, *Roger Stone Clemency Latest Example Of Trump Rewarding His Friends, Scholars Say*, NPR (July 12, 2020, 12:33 PM), <https://www.npr.org/2020/07/12/890075577/roger-stone-clemency-latest-example-of-trump-rewarding-his-friends-scholars-say>; Kevin Liptak et al., *Trump pardons former Sheriff Joe Arpaio*, CNN POLITICS (Aug. 27, 2017, 2:32 AM), <https://www.cnn.com/2017/08/25/politics/sheriff-joe-arpaio-donald-trump-pardon/index.html>; Pamela Brown et al., *Trump announces wave of pardons, including Papadopoulos and former lawmakers Hunter and Collins*, CNN POLITICS (Dec. 23, 2020, 6:14 AM), <https://www.cnn.com/2020/12/22/politics/trump-pardons/index.html>; Rachel E. VanLandingham & Geoffrey S. Corn, Opinion, *Trump’s Blackwater pardons erase the line between slaughter and justified wartime violence*, USA TODAY (Dec. 23, 2020, 2:47 PM), <https://www.usatoday.com/story/opinion/2020/12/23/trump-pardons-american-war-criminals-undermines-rule-law-column/4026014001/>.

372. E.g., Fabiola Cineas, *Donald Trump is the accelerant – A comprehensive timeline of Trump encouraging hate groups and political violence*, VOX (Jan. 9, 2021, 11:04 AM), <https://www.vox.com/21506029/trump-violence-tweets-racist-hate-speech>; Jon Porter, *Twitter restricts new Trump tweet for ‘glorifying violence’*, VERGE (May 29, 2020, 4:20 AM), <https://www.theverge.com/2020/5/29/21274323/trump-twitter-glorifying-violence-minneapolis-shooting-looting-notice-restriction>.

373. Rashaan Ayes, *DNC Speaker: My dad’s “only preexisting condition was trusting Donald Trump”*, AXIOS (Aug. 18, 2020), <https://www.axios.com/dnc-speaker-dad-coronavirus-trusting-trump-0c68b94e-4328-4338-8183-2e37a850de86.html>; Nathan Bomey, *Twitter removes Trump retweet sharing false information on COVID-19 deaths*, USA TODAY (Aug. 31, 2020, 10:22 AM), <https://www.usatoday.com/story/tech/2020/08/31/twitter-removes-trump-retweet-coronavirus-deaths/5678300002/>.

374. Savannah Smith, *Unmasked: How Trump’s mixed messaging on face-coverings hurt U.S. coronavirus response*, NBC NEWS (Aug. 9, 2020, 7:28 PM), <https://www.nbcnews.com/politics/donald-trump/calendar-confusion-february-august-trump-s-mixed-messages-masks-n1236088> (“The Trump administration’s conflicting messaging about mask-wearing over the last four to five months has created widespread confusion, hampered the country’s response to the coronavirus pandemic and even led to preventable deaths, multiple health experts said.”); *id.* (“‘People have died because we haven’t had consistent messaging on mask-wearing,’ said Dr. Gregory Kirk, a professor of infectious disease epidemiology at Johns Hopkins University. ‘I don’t think that’s really up to debate.’”).

stuff,” Trump said at the time.<sup>375</sup> Yet, Trump deliberately chose to downplay the seriousness of the virus.<sup>376</sup> As Trump told Woodward on March 19, 2020: “I wanted to always play it down. I still like playing it down.”<sup>377</sup>

Indeed, Trump inexplicably chose as a coronavirus advisor Dr. Scott Atlas, who—unlike renowned expert Dr. Anthony Fauci, the long-time director of the National Institute of Allergy and Infectious Diseases<sup>378</sup>—had no background in epidemiology or infectious diseases.<sup>379</sup> A group of Stanford University faculty members specifically rebuked Dr. Atlas because, through his statements, he “undermined and threatened public health even as countless lives have been lost.”<sup>380</sup> Trump himself put his own Secret Service agents and staff at risk, including by taking a “joyride” outside of Walter Reed, after contracting the coronavirus and while still infectious.<sup>381</sup> By December 2020, COVID-19 had killed more than 300,000 people in the United States,<sup>382</sup> with hospital intensive care units around the country reaching or at their capacities.<sup>383</sup> And in the wake of the rioting at the U.S. Capitol

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375. Quint Forgey & Matthew Choi, *‘This is deadly stuff’: Tapes show Trump acknowledging virus threat in February*, POLITICO (Sept. 9, 2020, 12:50 PM), <https://www.politico.com/news/2020/09/09/trump-coronavirus-deadly-downplayed-risk-410796>.

376. *Id.*

377. *Id.*

378. Anthony S. Fauci, M.D., *NIAID Director*, NAT’L INST. OF ALLERGY AND INFECTIOUS DISEASES, <https://www.niaid.nih.gov/about/director> (last visited Feb. 20, 2021).

379. Vanessa Romo, *Dr. Scott Atlas, Special Coronavirus Adviser to Trump, Resigns*, NPR (Nov. 30, 2020, 10:21 PM), <https://www.npr.org/2020/11/30/940376041/dr-scott-atlas-special-coronavirus-adviser-to-trump-resigns>.

380. Lucien Bruggeman & Libby Cathey, *Former Stanford colleagues warn Dr. Scott Atlas fosters ‘falsehoods and misrepresentations of science’*, ABC NEWS (Sept. 10, 2020, 10:24 AM), <https://abcnews.go.com/Politics/stanford-colleagues-warn-dr-scott-atlas-fosters-falsehoods/story?id=72926212>; Romo, *supra* note 379; Kaitlan Collins et al., *Dr. Scott Atlas resigns from Trump administration*, CNN POLITICS (Dec. 1, 2020, 8:04 PM), <https://www.cnn.com/2020/11/30/politics/scott-atlas-resigns-trump-administration-coronavirus-task-force/index.html>.

381. Elaine Godfrey & Adam Harris, *The People Trump Came Home To*, ATLANTIC (Oct. 5, 2020), <https://www.theatlantic.com/politics/archive/2020/10/trump-putting-white-house-staff-risk-covid-19/616617/>; Sam Meredith, *‘This is insanity’: Doctors slam Trump’s drive to greet supporters outside Walter Reed hospital*, CNBC (Oct. 5, 2020, 2:11 PM), <https://www.cnbc.com/2020/10/05/trump-doctors-slam-short-drive-outside-walter-reed-hospital.html>.

382. Daniel Funke & Katie Sanders, *Lie of the Year: The Downplay and Denial of the Coronavirus*, KHN (Dec. 16, 2020), <https://khn.org/news/article/lie-of-the-year-the-downplay-and-denial-of-the-coronavirus/>.

383. Meredith Deliso, *California reports record for COVID-19 deaths as ICU bed availability falls*, ABC NEWS (Dec. 17, 2020, 6:17 PM), <https://abcnews.go.com/Health/california-reports-record-covid-19-deaths-icu-bed/story?id=74790811>. “Operation Warp Speed,” by which COVID-19 vaccines were developed by scientists and produced and distributed by vaccine makers in record time, was

by Trump supporters, the U.S. recorded more than 4,000 dead *in a single day* on January 7, 2021, bringing the total COVID-19 death toll in the U.S. to more than 365,000 people as of that date.<sup>384</sup> Tragically, COVID-19 deaths crossed the 500,000 mark in February 2021, and they continue to climb.<sup>385</sup>

In addition, Donald Trump and his administration funneled taxpayer dollars to Trump-related businesses or entities,<sup>386</sup> made a

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a major achievement. Rebecca Shabad & Adam Edelman, *Biden receives COVID-19 vaccine, praises Trump's 'Operation Warp Speed'*, TODAY (Dec. 21, 2020, 1:06 PM), <https://www.today.com/news/biden-receives-covid-19-vaccine-praises-trump-s-operation-warp-t204420>. But the failure of Donald Trump, the Trump Administration, and the Trump campaign to follow the guidance of the Centers for Disease Control, as well as the interference with scientific judgments for political purposes, needlessly led to much death and sickness, with the U.S. suffering more COVID-19 cases and deaths than any other country. Grace Hauck & Joshua Bote, *President Trump and his staff defied CDC coronavirus guidelines 27 times since Sept. 1*, USA TODAY (Oct. 6, 2020, 7:07 PM), <https://www.usatoday.com/story/news/health/2020/10/06/trump-covid-19-24-times-trump-administration-violated-cdc-guidelines/3636834001/>; Grace Panetta, *2 former CDC officials say the Trump administration 'sidelined' science and hobbled the agency's COVID-19 response*, BUS. INSIDER (Dec. 16, 2020, 8:17 AM), <https://www.businessinsider.com/former-cdc-officials-white-house-ignored-science-hampered-coronavirus-response-2020-12>; Henrik Pettersson et al., *Tracking Covid-19's global spread*, CNN HEALTH (Feb. 19, 2021), <https://www.cnn.com/interactive/2020/health/coronavirus-maps-and-cases/> (reporting data from the Johns Hopkins University Center for Systems Science and Engineering). As of December 21, 2020, the number of COVID-19 cases in the U.S. surpassed 18 million and more than 319,000 people in the U.S. had died. Madeline Holcombe et al., *The Moderna vaccine is now in some Americans' arms as Covid-19 cases in the US pass 18 million*, CNN (Dec. 21, 2020, 8:58 PM), <https://www.cnn.com/2020/12/21/health/us-coronavirus-monday/index.html>.

384. Mark Katkov, *U.S. Records More Than 4,000 Dead In 1 Day From COVID-19, A Grim New Record*, NPR (Jan. 8, 2021, 12:48 PM), <https://www.npr.org/sections/coronavirus-live-updates/2021/01/08/954848161/u-s-records-more-than-4-000-dead-in-1-day-from-covid-19-a-grim-new-record>.

385. Pien Huang, *'A Loss To The Whole Society': U.S. COVID-19 Death Toll Reaches 500,000*, NPR (Feb. 22, 2021, 4:45 PM), <https://www.npr.org/sections/health-shots/2021/02/22/969494791/a-loss-to-the-whole-society-u-s-covid-19-death-toll-reaches-500-000>. The Centers for Disease Control and Prevention maintains a database to track COVID-19 statistics, including deaths in the U.S. and total vaccines administered. *COVID Data Tracker*, Centers for Disease Control and Prevention, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home>.

386. See, e.g., Dan Alexander & Michela Tindera, *How Donald Trump Moved Millions From His Campaign Donors To His Private Business*, FORBES (July 21, 2020, 7:22 AM), <https://www.forbes.com/sites/michelatindera/2020/07/21/how-donald-trump-moved-millions-from-his-campaign-donors-to-his-private-business/#7515d082735c>; David A. Graham, *Why Would a Billionaire Charge the Secret Service \$650 a Night?*, ATLANTIC (Feb. 7, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/why-does-billionaire-charge-secret-service-650-night/606253/>; Merrit Kennedy, *District of Columbia Sues Inaugural Committee For 'Grossly Overpaying' At Trump Hotel*, NPR (Jan. 22, 2020, 2:09 PM), <https://www.npr.org/2020/01/22/798500880/district-of-columbia-sues-inaugural-committee-for-grossly-overpaying-at-trump-ho>; Alex Altman, *Donald Trump's Suite of Power*, TIME, <https://time.com/donald-trumps-suite-of-power/> (last visited Feb. 20, 2021).

plethora of other unethical decisions,<sup>387</sup> ordered the resumption of federal executions<sup>388</sup> in the midst of a national and global trend to abandon capital punishment,<sup>389</sup> and even resorted to attacking and undermining the mission of the U.S. Postal Service, intentionally slowing down the transport of the U.S. mail (thus causing delays in the delivery of ballots and life-saving medications) in the lead up to the presidential election.<sup>390</sup> The Trump Administration went so far as to

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387. John McMurtrie et al., *Lest We Forget the Horrors: A Catalog of Trump's Worst Cruelties, Collusions, Corruptions, and Crimes*, MCSWEENEY'S (Jan. 20, 2021), <https://www.mcsweeneys.net/articles/the-complete-listing-so-far-atrocities-1-842>.

388. Press Release, U.S. Dep't of Justice, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>; John Bessler, *Conduct Unbecoming: The Resumption of Federal Executions*, UPDATES/U. OF BALT. SCH. OF L. (Jul. 13, 2020), <https://ublawaccolades.wordpress.com/2020/07/13/conduct-unbecoming-the-resumption-of-federal-executions/> (blog post describing the U.S. Government's plan to execute federal death row inmates).

389. Press Release, Fed. Foreign Office, Human Rights Commissioner Kofler on executions in the USA (Dec. 7, 2020), <https://www.auswaertiges-amt.de/en/newsroom/news/kofler-executions-usa/2424678> (noting that Dr. Bärbel Kofler, Federal Government Commissioner for Human Rights Policy and Humanitarian Assistance at the Federal Foreign Office, issued this statement on the federal executions that had already taken place in the U.S. and on those that were planned: "I am deeply sorry about both the five planned executions and the eight that have already been carried out in the United States at federal level in recent months. The execution of the death penalty in the United States goes against the global trend."); Cassandra Stubbs, *Not Even a Global Pandemic Could Stop the Federal Government from Pursuing a String of Back-to-Back Executions This Summer*, ACLU (Aug. 26, 2020), <https://www.aclu.org/news/capital-punishment/not-even-a-global-pandemic-could-stop-the-federal-government-from-pursuing-a-string-of-back-to-back-executions-this-summer/> ("This raw abuse of federal power to end human life comes at a time when most of the nation is moving away from capital punishment. A Gallup poll conducted last year found that 60 percent of Americans today prefer life imprisonment over the death penalty. Since the last federal execution in 2003, 10 states have formally abolished the death penalty, including Colorado, New Hampshire, and Washington state in recent years. Numerous other states have issued moratoriums.").

390. Chris Tye, *Postal Problems Mean No Checks, No Medications For Weeks*, CBS CHI. (Aug. 7, 2020, 9:03 PM), <https://chicago.cbslocal.com/2020/08/07/postal-problems-mean-no-checks-no-medications-for-weeks/>.



remove postboxes shortly before the November 2020 election,<sup>391</sup> all in a blatant attempt to curtail voting by mail.<sup>392</sup>

After losing the election, Donald Trump then blatantly lied about the election results as the Trump legal team made fatally flawed and frivolous arguments in court.<sup>393</sup> With Trump's lawyers outrageously targeting counties with large minority populations<sup>394</sup> and even promoting groundless, evidence-free conspiracy theories, Trump and his allies attempted to disenfranchise millions of American voters in an effort to overturn the election results.<sup>395</sup> "Voters, not lawyers, choose the

391. See Paul P. Murphy, *USPS will stop removing letter collection boxes in Western states until after the election, spokesman says*, CNN (Aug. 14, 2020, 10:43 PM), <https://www.cnn.com/2020/08/14/politics/usps-removes-letter-collection-boxes-reduces-post-office-operating-hours/index.html> ("The US Postal Service will stop taking letter collection boxes off streets in Western states following accusations the removals would further limit some voters ability to send back mail-in ballots. The change came after CNN and others reported on Friday that the US Postal Service has started reducing post office operating hours across several states and removing letter collection boxes, according to union officials. In a statement Friday night, Rod Spurgeon—a USPS spokesperson . . . told CNN that the service will stop the removal of letter collection boxes in 16 states and parts of two others until after the election.").

392. Press Release, Ctr. for Am. Progress, *STATEMENT: CAP's Sam Berger Condemns Trump's Blatant Effort To Sabotage the Post Office and Deny Americans Their Right To Vote* (Aug. 13, 2020), <https://www.americanprogress.org/press/statement/2020/08/13/489460/statement-caps-sam-berger-condemns-trumps-blatant-effort-sabotage-post-office-deny-americans-right-vote/>.

393. See Dareh Gregorian, *'Beyond an embarrassment,' legal experts say of Trump and Giuliani's floundering efforts in court*, NBC NEWS (Nov. 24, 2020, 3:28 AM), <https://www.nbcnews.com/politics/2020-election/beyond-embarrassment-legal-experts-say-trump-giuliani-s-floundering-efforts-n1248667>.

394. Mary Papenfuss, *Lawsuit 'Smacks of Racism': Wisconsin Judge Shreds Trump Lawyer Over Vote Challenge*, HUFFPOST (Dec. 12, 2020, 8:46 PM), [https://www.huffpost.com/entry/wisconsin-state-supreme-court-trump-lawsuit-racism\\_n\\_5fd54981c5b6218b42e99e88](https://www.huffpost.com/entry/wisconsin-state-supreme-court-trump-lawsuit-racism_n_5fd54981c5b6218b42e99e88). The Trump campaign's lawsuit in Wisconsin singled out just two of Wisconsin's 72 counties, with Wisconsin Supreme Court Justice Rebecca Dallet noting that those two counties are the "most urban, nonwhite, largest counties" in the state that had "voted overwhelmingly for Joe Biden." *Id.* Justice Dallet's colleague, Justice Jill Karofsky, added that those two counties were "targeted because of their diverse populations, because they're urban, I presume, because they vote Democratic." *Id.* "This lawsuit, Mr. Troupis, smacks of racism," Justice Karofsky said when she confronted Donald Trump's attorney, James Troupis, during a virtual hearing. *Id.* "What you want is for us to overturn this election so that your king can stay in power," she said. *Id.* "That is so un-American." *Id.*

395. Ann Gerhart, *Election results under attack: here are the facts*, WASH. POST (Mar. 11, 2020, 7:10 PM), <https://www.washingtonpost.com/elections/interactive/2020/election-integrity/>. As then President-Elect Joe Biden observed after the U.S. Supreme Court summarily rejected the Texas lawsuit attempting to invalidate the election results in battleground states and the Electoral College had voted:

This legal maneuver was an effort by elected officials and one group of states to try to get the Supreme Court to wipe out the votes of more than 20 million Americans in other states, and to hand the presidency to a candidate who lost the Electoral

President,” the U.S. Court of Appeals for the Third Circuit ruled in one case rejecting a Trump campaign lawsuit.<sup>396</sup> Trump’s efforts to hold onto power at all costs were aimed at undermining democratic norms and institutions, with Donald Trump’s legal challenges to the election continuing long after his loss.<sup>397</sup> One editorial in *The Irish Times* took stock of the “fragility” of American democracy after the mob had stormed the U.S. Capitol, but also, in the wake of the election of two Democratic U.S. senators in the run-off elections in the State of Georgia, saw “a more positive lesson: when democracy is fully mobilized, its enemies cannot win.”<sup>398</sup>

Donald Trump’s frequently conspiratorial, false, dehumanizing and demeaning Tweets and rhetoric, whether directed at women, minorities, immigrants, journalists, people with disabilities, or political adversaries were offensive and disgraceful, taking political behavior—including online activity—to new lows,<sup>399</sup> even prompting the social media companies to suspend Donald Trump’s accounts.<sup>400</sup> Not only did then-

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College, lost the popular vote, and lost each and every one of the states whose votes they were trying to reverse.

Meg Wagner, *Electoral College vote affirms Biden’s win*, CNN POLITICS (Dec. 15, 2020, 7:21 AM), <https://www.cnn.com/politics/live-news/electoral-college-vote-2020-biden-trump/index.html>.

396. Matthew S. Schwartz, *‘Voters, Not Lawyers, Choose The President’: Trump Team Dealt Another Blow In Court*, NPR (Nov. 27, 2020, 6:03 PM), <https://www.npr.org/2020/11/27/939526545/voters-not-lawyers-choose-the-president-trump-team-dealt-another-blow-in-court>.

397. The U.S. Supreme Court rejected a number of election challenges filed by Donald Trump and his allies in February 2021. Jessica Gresko, *Supreme Court rejects Trump election challenge cases*, ASSOCIATED PRESS (Feb. 22, 2021), <https://apnews.com/article/joe-biden-donald-trump-pennsylvania-elections-us-supreme-court-5cc6aee8c328c7bb1d423244b979bcec>.

398. Daniel Geary, *Trump has not been alone in undermining American democracy*, IRISH TIMES (Jan. 8, 2021, 9:57 AM), <https://www.irishtimes.com/opinion/trump-has-not-been-alone-in-undermining-american-democracy-1.4453124>.

399. See, e.g., Jeva Lange, Opinion, *The 65 worst Trump tweets of the 2010s*, WEEK (Oct. 26, 2019), <https://theweek.com/articles/870368/65-worst-trump-tweets-2010s>; Judd Legum, *Donald Trump’s 60 worst tweets of 2017, ranked*, THINK PROGRESS (Dec. 26, 2017, 9:56 AM), <https://archive.thinkprogress.org/trumps-worst-tweets-706ab04ab3b8/>; Ryan Teague Beckwith, *Here Are the 10 Donald Trump Tweets Americans Hate the Most*, TIME (Jan. 24, 2018, 1:08 PM), <https://time.com/5116461/donald-trump-twitter-tweets-poll-yougov/>; Daniel Dale, *Fact check: Trump litters his weekend tweetstorm with bizarre false claims*, CNN POLITICS (Apr. 27, 2020, 5:04 PM), <https://www.cnn.com/2020/04/27/politics/fact-check-trump-tweetstorm-birx-noble/index.html>; Irin Carmon, *Donald Trump’s Worst Offense? Mocking Disabled Reporter, Poll Finds*, NBC NEWS (Aug. 11, 2016, 12:24 AM), <https://www.nbcnews.com/politics/2016-election/trump-s-worst-offense-mocking-disabled-reporter-poll-finds-n627736>.

400. Billy Perrigo, *Facebook and Twitter Finally Locked Donald Trump’s Accounts. Will They Ban Him Permanently?*, TIME (Jan. 7, 2021, 7:34 AM), <https://time.com/5927398/facebook-twitter-trump-suspension-capitol/>; Brian Fung, *Twitter*

President Trump fail to attempt to quell or immediately condemn the rioting and violence at the U.S. Capitol on January 6, 2021 that he himself had plainly inspired with his baseless invective and rhetoric and his refusal to concede an election he lost,<sup>401</sup> but the Trump Administration's rush to execute so many death row inmates, including during the COVID-19 pandemic and the lame-duck period after the November 2020 election, illustrates what has been aptly called an almost "insatiable appetite for cruelty."<sup>402</sup>

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*bans President Trump permanently*, CNN BUS. (Jan. 9, 2021, 9:19 AM), <https://www.cnn.com/2021/01/08/tech/trump-twitter-ban/index.html>.

401. Instead, Trump initially called participants in the mob "very special." See Phil McCausland, *Dejected Trump supporters leave Washington, create new theories for Capitol violence*, NBC NEWS (Jan. 7, 2021, 6:17 PM), <https://www.nbcnews.com/news/us-news/dejected-trump-supporters-leave-washington-create-new-theories-capitol-violence-n1253407>.

402. Marianne Dhenin, *Opinion, Trump's is ending his term with a spree of executions, once again revealing his appetite for cruelty*, BUS. INSIDER (Dec. 20, 2020, 7:04 AM), <https://www.businessinsider.com/trump-sprees-federal-executions-administration-cruelty-brandon-bernard-2020-12>; see also Jean Marbella, *Amid pandemic and Trump's final chaotic days, a Maryland man with COVID-19 fights his upcoming federal execution*, BALT. SUN (Jan. 9, 2021), <https://www.baltimoresun.com/news/crime/bs-md-cr-federal-execution-higgs-20210108-bymmsetjt5g3fhzfrt4ezbbh4m-story.html>; Melissa Jeltsen, *Inside The Race To Save The Only Woman On Federal Death Row*, HUFFPOST (Jan. 8, 2021, 5:45 AM), [https://www.huffpost.com/entry/lisa-montgomery-federal-death-row\\_n\\_5ff73114c5b61a92a8c0861a](https://www.huffpost.com/entry/lisa-montgomery-federal-death-row_n_5ff73114c5b61a92a8c0861a). Cf. Johnny Magdaleno, *Terre Haute executions, including Lisa Montgomery's, paused by judge until COVID-19 measures are instituted*, MCPHERSON SENTINEL (Jan. 8, 2021, 1:39 PM), <https://www.mcphersonsentinel.com/story/news/2021/01/08/trumps-federal-execution-blitz-stalled-indiana-judge-order/6599459002/> ("The Trump administration's blitz of federal executions hit a setback on Thursday after a federal judge in Indiana ruled that more measures had to be taken to prevent the spread of COVID-19 at the Terre Haute federal prison facility before executions could continue. The administration hopes to carry out three more executions, including the execution of Lisa Montgomery, who will be the first woman executed by the federal government in nearly seven decades if the injunction is lifted.").

Abuses of power, of course, are nothing new.<sup>403</sup> Throughout human history, the rich have exploited the poor,<sup>404</sup> and the powerful have preyed upon the vulnerable.<sup>405</sup> The grotesque ideology of white supremacy, in fact, has centuries' old origins,<sup>406</sup> and it has raised its ugly head throughout world history,<sup>407</sup> including in Nazi Germany<sup>408</sup> and South

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403. *E.g.*, LARRY SCHWEIKART & MICHAEL ALLEN, A PATRIOT'S HISTORY OF THE UNITED STATES: FROM COLUMBUS'S GREAT DISCOVERY TO AMERICA'S AGE OF ENTITLEMENT 39 (2014) ("The story of abuses of power by Stuart kings was well known to Americans. Massachusetts Puritans, after all, had fled the regime of Charles I, leaving brethren in England to wage the English Civil War."); *id.* at 39-40 ("When James II ascended to the throne in 1685, he decided to single-handedly reorganize colonial administration. . . . [H]e violated constitutionalism and sanctity of contract by recalling the charters of all of the New England and Middle colonies—Massachusetts Bay, Pennsylvania, New York, and New Jersey—and the compact colonies Plymouth, Rhode Island, and Connecticut . . . . James II's plans for restoring an all-powerful monarchy dissolved between 1685 and 1688. A fervent opposition had arisen among those calling themselves Whigs, a derogatory term meaning 'outlaw' that James's foes embraced with pride. There began a second English civil war of the seventeenth century—between Whigs and Tories—but this time there was little bloodshed. James was exiled while Parliament made arrangements with his Protestant daughter, Mary, and her husband, William, of the Dutch house of Orange, to take the crown. William and Mary ascended the throne of England in 1689, but only after agreeing to a contract, the Declaration of Rights.").

404. *Fraud on the Stock Exchange*, MORNING CHRON., June 15, 1814, at 3 (noting Lord Ellenborough's concern "that we have one rule of law for the poor, and another for the rich").

405. *See generally, e.g.*, PREDATORY PRIESTS, SILENCED VICTIMS: THE SEXUAL ABUSE CRISIS AND THE CATHOLIC CHURCH (Mary Gail Frawley-O'Dea & Virginia Goldner eds., 2016); HOLLY AUSTIN SMITH, WALKING PREY: HOW AMERICA'S YOUTH ARE VULNERABLE TO SEX SLAVERY (2014). The 21st century's #MeToo and Black Lives Matter movements—to use two examples—have exposed the sexual exploitation and racial injustice faced by women and African Americans. JODI KANTOR & MEGAN TWOHEY, SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT (2019); CARLY GIESELER, THE VOICES OF #METOO: FROM GRASSROOTS ACTIVISM TO A VIRAL ROAR (2019); Kim Parker et al., *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RES. CTR. (June 12, 2020), <https://www.pewsocialtrends.org/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/>.

406. *E.g.*, GEORGE M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY (1981).

407. *E.g.*, HENRY LOUIS GATES, JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW 5 (2019) (discussing the racism on display in Abraham Lincoln's 1864 presidential election, and taking note of the "desperate effort to reassert white supremacy and decimate the gains in black equality promised by Reconstruction" which "led to the effective disenfranchisement of black male voters in the former Confederate states and the imposition of 'separate but equal' as the law of the land"); *see generally* NANCY L. CLARK & WILLIAM H. WORGER, SOUTH AFRICA: THE RISE AND FALL OF APARTHEID (3d ed. 2016) (discussing the history of racism and apartheid in South Africa).

408. GEORGE M. FREDRICKSON, RACISM: A SHORT HISTORY 126 (2002) ("Nazi racism . . . applied to all non-Aryans and not simply the Jews. Proclamations implementing the Nuremberg Laws put Gypsies in the same pariah category as Jews, and a substantial portion of them were placed in concentration camps within Germany in 1936, from which some would eventually be sent East to die in the gas chambers of Auschwitz.").

Africa's apartheid era,<sup>409</sup> with neo-Nazis and hate groups continuing to spew hatred and trying to sew division and social discord.<sup>410</sup> In the U.S., after deadly violence broke out in Charlottesville, Virginia, at a "Unite the Right" rally with white supremacists carrying torches, President Trump infamously declared that "there is blame on both sides."<sup>411</sup>

Those in power sometimes try to desperately cling to that power, with now former President Trump, who reportedly heard arguments in the Oval Office about the possibility of invoking martial law to stay in office,<sup>412</sup> being Exhibit A. Power-thirsty individuals who do not respect democratic norms will employ any means, however manipulative or nefarious in nature, to try to get what they want, including disinformation, violence and intimidation, and disenfranchising voters.<sup>413</sup> Using Dark Money,<sup>414</sup> gerrymandering,<sup>415</sup> and voter

409. See, e.g., CLARK & WORGER, *supra* note 407.

410. RACE AND RACISM IN THE UNITED STATES: AN ENCYCLOPEDIA OF THE AMERICAN MOSAIC 78 (Charles Gallagher & Cameron D. Lippard eds., 2014) ("The skinheads are an international movement of white, largely male youth gangs associated with neo-Nazi and white-power ideologies. Neo-Nazi skinhead groups are among the most militant advocates of white supremacy and are believed responsible for the commission of numerous hate crimes since the 1970s."); see Fabian Virchow, *Creating a European (neo-Nazi) Movement by Joint Political Action?*, in VARIETIES OF RIGHT-WING EXTREMISM IN EUROPE 202-05, 209-10 (Andrea Mammone et al. eds., 2013) (discussing Neo-Nazis); Anya Kamenetz, *Right-Wing Hate Groups Are Recruiting Video Gamers*, NPR (Nov. 5, 2018, 10:37 AM), <https://www.npr.org/2018/11/05/660642531/right-wing-hate-groups-are-recruiting-video-gamers>.

411. Jonathan Lemire & Julie Pace, WATCH: *Trump blames 'both sides' for violence at Charlottesville rally*, PBS NEWS HOUR (Aug. 15, 2017, 4:50 PM), <https://www.pbs.org/newshour/politics/trump-blames-sides-violence-charlottesville-rally>; Jonathan D. Karl, *The Second Battle of Charlottesville*, ATLANTIC (June 30, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/die-was-cast-after-charlottesville/613645/>.

412. Jazmin Goodwin, *Trump's talk of martial law sends White House staffers rushing to the press*, CNN BUS. (Dec. 21, 2020, 12:01 AM), <https://www.cnn.com/2020/12/20/media/stelter-trump-martial-law/index.html>.

413. See, e.g., Ayesha Sharma, *Civil death: how millions of Americans lost their right to vote*, GUARDIAN (Aug. 7, 2020, 8:00 PM), <https://www.theguardian.com/us-news/2020/aug/07/americans-voting-rights-disenfranchisement>.

414. See, e.g., JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT (2017).

415. E.g., STEVE BICKERSTAFF, ELECTION SYSTEMS AND GERRYMANDERING WORLDWIDE 9 (2020) ("A gerrymander is a manipulation of electoral districts such that an incumbent or a political party (usually the dominant one) attempts to use the reallocation of seats or redrawing of electoral district boundaries, or the failure to do so, for their own advantage. Essentially a gerrymander occurs when self-interest is substituted for the public's interest."); *id.* at 10 ("The practice of designing electoral districts for political advantage dates back to the earliest use of districts for elections. The practice as given a name (as Gerrymander) in the Boston Gazette (USA) on March 26, 1812 when the word was first used to describe a redrawing of Massachusetts state senate election districts by the Massachusetts Legislature during the term of Governor Elbridge Gerry. One of the districts was claimed to

suppression<sup>416</sup> targeted at racial minorities,<sup>417</sup> they try to pick their voters, rather than allowing all eligible voters with easy access to ballot boxes to pick their elected leaders.<sup>418</sup> “I felt a growing sadness as I listened to a recording of Donald Trump begging, bullying, cajoling, and threatening Georgia Secretary of State Brad Raffensperger in an attempt to make him do something he can’t—overturn Trump’s loss in the presidential race,” Solomon Jones wrote in an op-ed for *The Philadelphia Inquirer*.<sup>419</sup>

#### VIII. THE RULE OF LAW’S IMPORTANCE TO SAFEGUARDING CIVIL LIBERTIES AND HUMAN RIGHTS

As history shows, shockingly horrific—even genocidal—consequences can flow from a societal breakdown of the Rule of Law.<sup>420</sup> Just consider Nazi Germany and The Holocaust,<sup>421</sup> the Rwandan

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resemble the shape of a mythological salamander. The word ‘gerrymander’ is a combination of the governor’s last name and the word salamander.”).

416. See generally CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY (2018).

417. E.g., Chad Vickery & Heather Szilagyi, *America in Comparative Perspective*, in ELECTORAL INTEGRITY IN AMERICA: SECURING DEMOCRACY 188 (Pippa Norris et al. eds., 2019) (“Courts have ruled that voter identification laws were implemented with the intent to discriminate in several cases, generally against African American voters. In striking down a North Carolina voter ID law, a federal court found that the provisions ‘target African Americans with almost surgical precision.’”).

418. Jack Reynolds, *Chapter 10: The Rules of the Game*, in THE OXFORD HANDBOOK OF AMERICAN POLITICAL HISTORY 190 (Paula Baker & Donald T. Critchlow eds., 2020) (noting that redistricting is done by legislatures, often to protect incumbents, and that “[m]odern-day state legislators pick their voters rather than the other way around”).

419. Solomon Jones, Opinion, *Trump’s tactics in Georgia call are straight from the white supremacy playbook*, PHILA. INQUIRER (Jan. 6, 2021), <https://www.inquirer.com/opinion/trump-call-georgia-election-raffensperger-black-voters-20210106.html>.

420. As Tom Bingham (1933-2010), a British judge who served as the Lord Chief Justice of England and Wales from 1996 to 2000, wrote shortly before his death:

The hallmarks of regime which flouts the rule of law are alas, all too familiar: the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and concentration camp, the gas chamber, the practice of genocide or ethnic cleansing, the waging of aggressive war. The list is endless.

EDWARD M. HARRIS, THE RULE OF LAW IN ACTION IN DEMOCRATIC ATHENS 3 (2013); see also Martin Childs, *Lord Bingham of Cornhill: Lawyer who fought for judicial independence and was widely recognized as the greatest judge of his time*, INDEPENDENT (Oct. 23, 2011, 8:49 AM), <https://www.independent.co.uk/news/obituaries/lord-bingham-cornhill-lawyer-who-fought-judicial-independence-and-was-widely-recognised-greatest-judge-his-time-2078393.html>.

421. E.g., JACK R. FISCHEL, HISTORICAL DICTIONARY OF THE HOLOCAUST 10 (3d ed. 2020) (“The number of Jews killed by the Germans in the Holocaust cannot be precisely calculated. Various historians, however, have provided estimates that range between 4,204,000 and 7,000,000, with the use of the round figure of six million Jews murdered as the best estimate to describe the immensity of the Nazi genocide. The Germans exterminated

genocide,<sup>422</sup> “ethnic cleansing” in Bosnia-Herzegovina,<sup>423</sup> and all of the atrocities committed by the regimes in Turkey, Syrian and Iran.<sup>424</sup> In

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approximately 54 percent of the Jews within their reach, including almost two million children under the age of 18. Jews, however, were not the only target of the Nazis. During the war, an estimated 10,547,000 Eastern Europeans, including millions of Poles, Ukrainians, Byelorussians, Gypsies, and Soviet POWs, were also killed.”). During the Holocaust, Nazi concentration camps became killing centers, with more than one million Jews murdered in gas chambers at Auschwitz-Birkenau. SUSAN MEYER, NAZI CONCENTRATION CAMPS: A POLICY OF GENOCIDE 38-39 (2015); *see also* HUMAN MEDICAL EXPERIMENTATION: FROM SMALLPOX VACCINES TO SECRET GOVERNMENT PROGRAMS 128 (Frances R. Frankenburg ed., 2017) (noting that “Auschwitz was a group of concentration camps in southern Poland, situated some 37 miles west of Krakow” and that “[t]here were three separate concentration camps at the site: Auschwitz I (the main camp), Birkenau (Auschwitz II), and Monowitz (Auschwitz III)”); that “[p]risoners were killed with a gas derived from prussic acid, but known by its brand name Zyklon-B”; and that “[a]s many as 1 million people were exterminated at Birkenau between 1942 and late 1944”); *cf.* SCOTT CHRISTIANSON, THE LAST GASP: THE RISE AND FALL OF THE AMERICAN GAS CHAMBER 1 (2010) (noting that “[t]he earliest gas chamber for execution purposes was constructed in the Nevada State Penitentiary at Carson City and first employed on February 8, 1924, with the legislatively sanctioned and court-ordered punishment of Gee Jon, a Chinese immigrant who had been convicted of murdering another Chinese immigrant, amid a wave of anti-immigrant and racist hysteria that gripped the country at that time”).

422. Roméo Dallaire & Kishan Manocha, *The Major Powers and the Genocide in Rwanda*, in THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS 61 (Ralph Henham & Paul Behrens eds., 2007) (“The genocide in Rwanda, in which over 800,000 Rwandan men, women and children were brutally murdered in an orgy of violence almost beyond the capacity of the human heart to contemplate, was deliberately planned and ruthlessly executed by a powerful elite within a government that had gone out of control.”).

423. STEVEN L. BURG & PAUL S. SHOUP, THE WAR IN BOSNIA-HERZEGOVINA: ETHNIC CONFLICT AND INTERNATIONAL INTERVENTION 171 (2000) (“After only a month of fighting the UN estimated some 520,000 persons—12 percent of the population—had been displaced. The unclassified CIA memorandum of November 1995 estimated that 900,000 to 1.2 million refugees had fled Bosnia to other countries, and an additional 1.3 to 1.5 million individuals still inside the country had been displaced from their homes. This amounted to more than half the total pre-war population of the country.”); *see also* MICHAEL HUMPHREY, THE POLITICS OF ATROCITY AND RECONCILIATION: FROM TERROR TO TRAUMA 69 (2002) (“The popular understanding of the term ‘ethnic cleansing’ invokes the horror of tribal hatreds and primordial allegiances. The term was coined in the 1990s to describe war in Bosnia-Herzegovina, a war over the disintegration of one nation-state, the former Yugoslavia, and the formation of others—Serbia, Bosnia and Croatia. In fact ‘ethnic cleansing’ describes a deliberate process of massacre and population displacement designed to ‘cleanse the ground’ (*ciscenje terena*).”); H. ZEYNEP BULUTGIL, THE ROOTS OF ETHNIC CLEANSING IN EUROPE 177 (2016) (“[E]thnic cleansing is defined and measured as an event in which a state forcefully and permanently deports or kills at least 20% of an ethnic group in its territory within three years.”).

424. *Turkey – Events of 2019*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2020/country-chapters/turkey> (last visited Mar. 7, 2021) (“Turkey has been experiencing a deepening human rights crisis over the past four years with a dramatic erosion of its rule of law and democracy framework.”); Susie Linfield, *Syria’s Torture Photos: Witness to Atrocity*, N.Y. REV. OF BOOKS (Feb. 9, 2019), <https://www.nybooks.com/daily/2019/02/09/syrias-torture-photos-witness-to-atrocity/> (“For eight years, the world has watched as the forces of a criminal butcher, President Bashar al-Assad, have bombed, raped, tortured, displaced, and murdered millions of their countrymen,

sharp contrast, the ideal of the Rule of Law, one articulated long ago, is that everyone will be treated fairly and equally by the law.<sup>425</sup> A Rule of Law system puts people front and center in their own governance, divides power to prevent its abuse,<sup>426</sup> insists on equal application of the laws, and requires an independent judiciary and skilled lawyers<sup>427</sup> to vigilantly safeguard individual rights.<sup>428</sup> Before the onset of the Revolutionary War (1775-1783), the Continental Congress, in 1774, drew particular inspiration from Beccaria's *On Crimes and*

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women, and children.”); ENSEMBLE CONTRE LA PEINE DE MORT & IRAN HUMAN RIGHTS, ANNUAL REPORT ON THE DEATH PENALTY IN IRAN 7 (2019), <http://www.ecpm.org/wp-content/uploads/Rapport-iran-2020-gb-070420-WEB.pdf> (noting that “[a]t least 280 people were executed in 2019, 7 more compared to 2018,” that “[a]t least . . . 30 people . . . were executed for drug-related charges,” and that “[a]t least 4 juvenile offenders were among those executed”); *Executions Down In Iran, But Total 6,000 In Ten Years – Report*, RADIO FARDA (Mar. 2, 2019), <https://en.radiofarda.com/a/executions-down-in-iran-but-total-6-000-in-ten-years---report/29799863.html> (“An Oslo-based human rights organization monitoring the death penalty in Iran has disclosed that the country has executed nearly 6,000 people over the past decade.”).

425. *The Rule of Law*, STAN. ENCYCLOPEDIA OF PHIL. (June 22, 2016), <https://plato.stanford.edu/entries/rule-of-law/>.

426. ALAN GREENE, PERMANENT STATES OF EMERGENCY AND THE RULE OF LAW: CONSTITUTIONS IN AN AGE OF CRISIS 4-5 (2018) (“The separation of powers in the Roman Republic, much like modern states today, divided power amongst different institutions which checked and balanced each other: the Senate, the magistrates, and the people through elected officials called tribunes. This ‘separation of powers’, however, is not synonymous with the three branches of legislature, executive and judiciary seen in modern states today. Rather, the Roman Republic, according to Cicero, was more an embodiment of Plato’s republic, where the three forms of government of the ancient world—monarchy, oligarchy and democracy—existed simultaneously, thus preventing one form decaying into another.”); THE OXFORD CLASSICAL DICTIONARY 1505 (Simon Hornblower et al. eds., 4th ed. 2012) (noting that “tribunes” were “the officers of the *plebs* first created in 500–450 BC (traditionally in 494, the date of the first secession of the *plebs* and their corporate recognition)” who were “[e]lected by the plebian assembly . . . and exercising their power within the precincts of the city”; “[t]he original number of the tribunes is variously given as two, four, or five; by 449 it had certainly risen to ten”; and “[t]he tribunes were charged with the defence of the persons and property of the plebeians” and “possessed, . . . though perhaps not from the very first, a right of veto . . . against any act performed by a magistrate (or by another tribune)”).

427. Law schools and lawyers have long played a critical role in societies and in laying a solid foundation for the Rule of Law, and they will continue to do so. Gene R. Shreve, *Is Law a Discipline? Forays into Academic Culture*, 68 CLEV. ST. L. REV. 217, 229 (2020) (“[L]aw schools were part of European universities from the medieval period. ‘By the late Middle Ages, . . . the term ‘discipline’ was being applied to professions such as medicine, law and theology.’ Law schools played a vital role in the institutional and intellectual development of these early universities.”).

428. U.S. Supreme Court Justice Ruth Bader Ginsburg, in a foreword to a book on the Rule of Law in the 21st century, noted that the Magna Carta—penned more than 800 years ago—“identified twin pillars of the rule of law: the supremacy of the law over the will of the king; and an independent, incorruptible judiciary, sworn to render judgments in accord with the law of the land.” Ruth Bader Ginsburg, *Foreword to THE RULE OF LAW IN THE 21ST CENTURY: A WORLDWIDE PERSPECTIVE* (Robert A. Stein & Justice Richard J. Goldstone eds., 2015).



*Punishments*—a book that opposed tyrannical practices—in articulating a core principle of the Enlightenment and of the American Revolution.<sup>429</sup> As the Continental Congress wrote that year in a letter to the inhabitants of Quebec:

‘In every human Society,’ says the celebrated Marquis Beccaria, following the steps of the immortal Montesquieu in impressing sentiments of Humanity, ‘there is an Effort continually tending to confer on one Part the height of Power and Happiness, and to reduce the other to the extreme of Weakness & Misery. The intent of good Laws, is to oppose this Effort, and to diffuse their Influence, universally, & equally.’<sup>430</sup>

When corrupt politicians such as Donald Trump repeatedly lie, ignore or brazenly violate laws and norms, refuse to comply with subpoenas, excoriate journalists and judges to deflect their own wrongdoing, use hate speech and racially charged rhetoric, employ division and disinformation to manipulate, and seek to enrich themselves at the taxpayers’ expense, the Rule of Law is eroded and undermined,<sup>431</sup> especially if there are no immediate consequences—or plainly insufficient pushback—for such behavior and misconduct. And that is the case even though the long-standing principle that “no one is above the law” might be occasionally invoked, whether rhetorically or by the courts,<sup>432</sup> when it appears to the general public that nothing concrete is, in actuality, ever done to check the misconduct, illegality, or abuses of power. As Joyce Vance, a law professor at the University of Alabama

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429. See *John Dickinson’s Draft Letter to Quebec*, in LETTERS OF DELEGATES TO CONGRESS, AUGUST 1774-AUGUST 1775, at 236-44 (Paul H. Smith ed., 1976).

430. BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 197, at 147; see also *John Dickinson’s Draft Letter to Quebec*, *supra* note 429, at 236-44.

431. See Paul Rosenzweig, *Trump’s Defiance of the Rule of Law*, ATLANTIC (June 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/trumps-unique-assault-rule-law/590875/>.

432. In *Trump v. Vance*, 140 S. Ct. 2412 (2020), in which the U.S. Supreme Court held Article II and the U.S. Constitution’s Supremacy Clause do not categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President, Chief Justice John Roberts began the majority opinion as follows:

In our judicial system, ‘the public has a right to every man’s evidence.’ Since the earliest days of the Republic, ‘every man’ has included the President of the United States. Beginning with Jefferson and carrying on through Clinton, Presidents have uniformly testified or produced documents in criminal proceedings when called upon by federal courts.

*Id.* at 2420; see also *id.* at 2431 (“Two hundred years ago, a great jurist of our Court established that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding. We reaffirm that principle today and hold that the President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need.”); *id.* at 2432 (Kavanaugh, J., concurring) (“In our system of government, as this Court has often stated, no one is above the law. That principle applies, of course, to a President.”).

and a former U.S. Attorney for the Northern District of Alabama, put it nicely: “Accountability is essential to our system of government. The Founding Fathers created checks and balances to keep any one branch from growing too powerful.”<sup>433</sup>

In today’s world, there are many pressing problems that need to be addressed, including global warming and the climate crisis,<sup>434</sup> poverty and hunger,<sup>435</sup> a lack of affordable health care,<sup>436</sup> discrimination<sup>437</sup> and unemployment,<sup>438</sup> pollution<sup>439</sup> and habitat destruction,<sup>440</sup> the plight of tens of millions of refugees and forcibly displaced persons,<sup>441</sup> hate crimes and the use of excessive force,<sup>442</sup> and matters of peace and

433. Joyce White Vance, *If the Senate Doesn’t Hold Trump Accountable, the Damage Will Go Far Beyond This Presidency*, TIME (Jan. 29, 2020, 2:22 PM), <https://time.com/5773796/donald-trump-impeachment-accountability/>.

434. See generally SHAWN LAWRENCE OTTO, THE WAR ON SCIENCE: WHO’S WAGING IT, WHY IT MATTERS, WHAT WE CAN DO ABOUT IT (2016).

435. See generally THE SAGE ENCYCLOPEDIA OF WORLD POVERTY (Mehmet A. Odekon ed., 2d ed. 2015); see generally STEPHEN C. SMITH, ENDING GLOBAL POVERTY: A GUIDE TO WHAT WORKS (2015); see generally MARTÍN CAPARRÓS, HUNGER: THE OLDEST PROBLEM (Katherine Silver trans., 2019).

436. See, e.g., Stephanie Armour, *Number of Uninsured Americans Rises for First Time in Decade*, WALL ST. J. (Sept. 10, 2019), <https://www.wsj.com/articles/number-of-americans-without-insurance-shows-first-increase-since-2008-11568128381> (“The number of Americans without health insurance climbed to 27.5 million in 2018, according to federal data that show the first year-to-year increase in a decade, before the Affordable Care Act began reducing the ranks of the uninsured.”).

437. See generally DAVID B. OPPENHEIMER, SHEILA R. FOSTER, SORA Y. HAN & RICHARD T. FORD, COMPARATIVE EQUALITY AND ANTI-DISCRIMINATION LAW (3d ed. 2020).

438. Harry Kretchmer, *How coronavirus has hit employment in G7 economies*, WORLD ECON. F. (May 13, 2020), <https://www.weforum.org/agenda/2020/05/coronavirus-unemployment-jobs-work-impact-g7-pandemic/> (“Hundreds of millions of people could be left without work due to the impact of COVID-19, the UN’s work agency warns.”).

439. See generally MARK Z. JACOBSON, ATMOSPHERIC POLLUTION: HISTORY, SCIENCE, AND REGULATION (2002).

440. MIKAILA MARIEL LEMONIK ARTHUR, LAW AND JUSTICE AROUND THE WORLD: A COMPARATIVE APPROACH 307 (2020) (“Overfishing, habitat destruction, and other human activities are leading to the mass extinction of species.”).

441. SERENA PAREKH, NO REFUGE: ETHICS AND THE GLOBAL REFUGEE CRISIS 4 (2020) (“[T]he total number of people forcibly displaced from their home as of 2019 is 70.8 million. While most are displaced within their own countries and never leave—41.3 million are internally displaced and not technically considered refugees—about 25 million are considered refugees, half of whom are children. Another 3.5 million are asylum seekers. In other words, there are a lot of people who do not have a place in the world where their human rights are secure.”).

442. Barbara Sprunt, *‘Enough Is Enough’: Democrats Push For GOP Support On Asian American Hate Crimes Bill*, NPR (Apr. 13, 2021, 3:07 PM), <https://www.npr.org/2021/04/13/986749681/enough-is-enough-democrats-push-for-gop-support-on-asian-american-hate-crimes-bi>; Vanessa Romo, *Chauvin Trial: Expert Says Use Of Force In George Floyd Arrest Was Not Reasonable*, NPR (Apr. 12, 2021, 8:51 PM), <https://www.npr.org/sections/trial-over-killing-of-george->

international security.<sup>443</sup> Consequently, respect for the Rule of Law must be restored post-haste in the post-Trump presidency, and there must be a much-needed renewal—indeed, an amplification—of the commitment to further it. The global future of the Rule of Law, in fact, must concentrate on better protecting human rights,<sup>444</sup> combatting corruption,<sup>445</sup> eliminating poverty and hunger,<sup>446</sup> reducing disease and other forms of human suffering,<sup>447</sup> funding and fostering legal aid

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floyd/2021/04/12/986613631/chauvin-trial-expert-says-use-of-force-in-george-floyd-arrest-was-not-reasonable.

443. See generally, e.g., HANDBOOK OF INTERNATIONAL SECURITY AND DEVELOPMENT (Paul Jackson ed., 2015); see generally THE WORLD BANK & THE UNITED NATIONS, PATHWAYS FOR PEACE: INCLUSIVE APPROACHES TO PREVENTING VIOLENT CONFLICT (2018).

444. Around the world, human rights activists and those seeking racial and social justice are increasingly active and well-organized. See generally MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998). The law itself must do a much better job of combating all forms of discrimination and protecting people's individual rights, including eliminating torturous and cruel practices such as capital punishment. See generally F. MICHAEL HIGGINBOTHAM, GHOSTS OF JIM CROW, ENDING RACISM IN POST-RACIAL AMERICA (2013); JOHN D. BESSLER, THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION (2017); BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2015); John D. Bessler, *Taking Psychological Torture Seriously: The Torturous Nature of Credible Death Threats and the Collateral Consequences for Capital Punishment*, 11 NE. U.L. REV. 1 (2019).

445. Combatting Corruption, WORLD BANK, <https://www.worldbank.org/en/topic/governance/brief/anti-corruption> (last updated Dec. 14, 2020) ("The World Bank Group considers corruption a major challenge to its twin goals of ending extreme poverty by 2030 and boosting shared prosperity for the poorest 40 percent of people in developing countries. In addition, reducing corruption is at the heart of the Sustainable Development Goals and achieving the ambitious targets set for Financing for Development."); Giulia Mugellini & Jean-Patrick Villeneuve, *Monitoring the Risk of Corruption at International Levels: The Case of the United Nations Sustainable Development Goals*, 10 EUR. J. RISK REG. 201, 202 (2019) ("The 2030 Agenda for Sustainable Development recognises corruption as an obstacle for sustainable development and devotes one specific target to this issue. In particular, under the umbrella of Goal 16 to 'Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels', Target 16.5 aims to 'Substantially reduce corruption and bribery in all their forms'. The reduction of corruption is considered one of the most important steps to pave the way for sustainable development and to promote inclusive societies by building effective, accountable and inclusive institutions at all levels.").

446. BARRY B. HUGHES ET AL., REDUCING GLOBAL POVERTY: PATTERNS OF POTENTIAL HUMAN PROGRESS 10 (2009) (discussing the U.N.'s Millennium Development Goals and their targets for reducing poverty and hunger and the proportion of the world's population living on less than \$1.00 per day).

447. The World Justice Project, which seeks to advance the rule of law worldwide, has made this observation:

Effective rule of law reduces corruption, combats poverty and disease, and protects people from injustices large and small. It is the foundation for communities of equity, opportunity, and peace—underpinning development, accountable government, and respect for fundamental rights. Traditionally, the rule of law has been viewed as the domain of lawyers and judges. But everyday issues of safety,

services<sup>448</sup> and an independent judiciary,<sup>449</sup> and bringing more equality and human dignity to the world's diverse societies.<sup>450</sup>

#### IX. THE DEATH PENALTY AS THE ULTIMATE VIOLATION OF THE RULE OF LAW

There have always been injustices to fight, whether in the realm of racial or gender inequality or as regards barbaric punishments that violate human dignity. In the Dark Ages and Medieval times—indeed, throughout recorded human history—draconian codes of laws have existed, with early law codes (e.g., Urukagina's Code, the Code of Hammurabi, Draco's Code, the Massachusetts Body of Liberties) making an array of offenses punishable by death.<sup>451</sup> A summary

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rights, justice, and governance affect us all; everyone is a stakeholder in the rule of law.

KONSTANTINOS A. KAPPARIS, *ATHENIAN LAW AND SOCIETY* 23, 62 (2019) (ch. 1, n.14).

448. *The Unmet Need for Legal Aid*, LEGAL SERVS. CORP., <https://www.lsc.gov/what-legal-aid/unmet-need-legal-aid> (last visited Mar. 7, 2021) ("Nearly a million poor people who seek help for civil legal problems are turned away because of the lack of adequate resources. The justice gap represents the difference between the level of civil legal assistance available and the level that is necessary to meet the legal needs of low-income individuals and families.").

449. Sellers, *An Introduction to the Rule of Law in Comparative Perspective*, *supra* note 80, at 5 ("The first necessary and inescapable desideratum of the rule of law is an independent judiciary. Judges must be secure and well-paid, so that they can apply the law without fear or favor."); *id.* at 8-9 ("Rule of law' states finally come into being with the emergence of constitutional government, provided that the constitution seeks justice and the common good through the checks and balances of divided governmental power, under the ultimate review of independent judges.").

450. *Id.* at 6 ("This link between the rule of law and a 'common good' theory of justice is profound and essential. The 'empire of laws and not of men' seeks a world of 'equal' laws that serve all those subject to their control. This absence of partiality is what sets government 'de jure' apart from government 'de facto' (to use the old terminology) and distinguishes 'the empire of laws' from 'the government of men.'"); *id.* at 7 ("The rule of law entails the impartial pursuit of justice, which requires an equal concern for the welfare of all members of society.").

451. GREG ROENSCH, *FURMAN V. GEORGIA: CRUEL AND UNUSUAL PUNISHMENT* 13 (2007) (noting that "[t]he death penalty has been part of legal systems, or codes, since the earliest times in human history"; that "[o]ne of the oldest known legal systems is Urukagina's Code, which was written in 2350 B.C.," and that although "[t]he actual text of this Mesopotamian code has never been found," it is described in ancient sources and "indicated that the king received his authority straight from the gods," that it "specified that certain crimes—including theft and adultery—were punishable by death," and that stoning was the method of execution); ROBERT FRANCIS HARPER, *THE CODE OF HAMMURABI, KING OF BABYLON ABOUT 2250 B.C.* §§ 1-3, 6-11, 14-16, 19, 21-22, 26, 33-34, 108-10, 116, 129-30, 133, 143, 153, 155, 157, 210, 227, 229-30 (2d ed. 1999) (reprinting the Code of Hammurabi, which makes numerous offenses punishable by death); ALBERT JACK, *BLACK SHEEP AND LAME DUCKS: THE ORIGINS OF EVEN MORE PHRASES WE USE EVERY DAY* (2010) (noting in the unpaginated entry for "[a] Draconian measure" of Draco's Code in Athens in the seventh century BC: "Draco drew up a code of laws that were so severe that almost any crime at all was considered to be a capital offense, punishable by death. The orator Demades

execution or the infliction of the death penalty, however, constitutes the total denial of another person's humanity,<sup>452</sup> not only because credible death threats (an immutable characteristic of any capital punishment regime) are torturous in nature,<sup>453</sup> but because killings and state-

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famously claimed that Draco's code was actually 'written in the blood of criminals.' "); John D. Bessler, *Foreword: The Death Penalty in Decline: From Colonial America to the Present*, 50 CRIM. L. BULL. 245, 245 (2014) (noting that the "Massachusetts 'Body of Liberties,' adopted in 1641, contained twelve capital offenses and authorized the imposition of up to forty lashes," and that the English "Bloody Code" made more than 150 offenses punishable by death).

452. The death penalty has long been administered in an arbitrary and racially discriminatory fashion. See generally John D. Bessler, *The Concept of "Unusual Punishments" in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual*, 13 NW. J. L. & SOC. POL'Y 307 (2018); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (1995); accord Steven F. Shatz, Glenn L. Pierce & Michael L. Radelet, *Race, Ethnicity, and the Death Penalty in San Diego County: The Predictable Consequences of Excessive Discretion*, 51 COLUM. HUM. RTS. L. REV. 1072, 1098 (2020) ("Beyond the risk of arbitrariness, the study documents discrimination. We found that, in murder prosecutions during the relevant time period—particularly in cases with white victims and black defendants—a substantial factor in prosecutors' decision whether to charge special circumstances and in the District Attorney's decision whether to seek the death penalty was the race/ethnicity of the victims and defendants."). The Constitutional Court of South Africa declared that country's death penalty to be unconstitutional way back in 1995, see *S v. Makwanyane* 1995 (3) 391 (CC) at 200 (S. Afr.), and the continent of Europe (with the exception of Belarus) is now a death penalty-free zone. Robert A. Stein, *The History and Future of Capital Punishment in the United States*, 54 SAN DIEGO L. REV. 1, 6-7 (2017) (noting that "[a] de facto prohibition on the death penalty became the norm in Europe," and that "[t]oday, capital punishment has been abolished in every European country except Belarus"); John Quigley & S. Adele Shank, *Why Europe Abolished Capital Punishment*, 17 OHIO ST. J. CRIM. L. 95, 129 (2019) (documenting the death penalty's abandonment in Europe and observing of European countries: "The death penalty has come to be seen as a sign of a lack of civilization, as a punishment fundamentally at odds with how a government should conduct itself. Europeans have come around to the belief of J.W. Pease that capital punishment is 'no longer needed for the civilization of the age in which we live.' "). Yet, the U.S. Supreme Court, the U.S. Government, and a number of American states still allow the death penalty's use, as do several countries (e.g., China, Iran, Saudi Arabia, Iraq, Pakistan, Yemen, Sudan and Egypt) that are known for their totalitarian, authoritarianism or oligarchic rule and for their regular denial of basic human rights. See Kevin M. Barry, *The Law of Abolition*, 107 J. CRIM. L. & CRIMINOLOGY 521, 521-24, 526 n.28 (2017). A ruling by the U.S. Supreme Court that the death penalty is unconstitutional would be a long-overdue recognition of the death penalty's torturous character and inhumanity—and of its invidious and discriminatory use on the basis of race. See generally John D. Bessler, *The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments*, 73 WASH. & LEE L. REV. ONLINE 487 (2016), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol73/iss1/22>; see also Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the In(Visibility) of Race*, 82 U. CHI. L. REV. 243 (2015) (discussing the racial discrimination in the death penalty's administration).

453. See generally John D. Bessler, *Torture and Trauma: Why the Death Penalty Is Wrong and Should be Strictly Prohibited by American and International Law*, 58 WASHBURN L.J. 1 (2019); John D. Bessler, *The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions*, 79 MONT. L. REV. 7, 44 (2018).

sanctioned executions extinguish what Hannah Arendt, in reflecting on the condition of statelessness, aptly called a person's "right to have rights."<sup>454</sup> As the late U.N. Secretary-General Kofi Annan once said: "The forfeiture of life is too absolute, too irreversible, for one human being to inflict it on another, even when backed by legal process."<sup>455</sup>

Not only did Donald Trump advocate for the use of torture<sup>456</sup> and regularly denigrate, demean, and dehumanize asylum seekers, refugees and immigrants, LGBTQ+ community members, and people of color,<sup>457</sup>

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454. Masha Gessen, *"The Right to Have Rights" and the Plight of the Stateless*, NEW YORKER (May 3, 2018), <https://www.newyorker.com/news/our-columnists/the-right-to-have-rights-and-the-plight-of-the-stateless> ("Sixty-nine years ago, Hannah Arendt wrote a phrase that has gradually become one of her most quoted and often interpreted: 'the right to have rights.' . . . The Arendt phrase, used first in a 1949 article and again in the 1951 book *'The Origins of Totalitarianism,'* has been the subject of a series of interpretations in the last few years. Most recently, Verso has published an elegant little book of essays by four academics who endeavored not only to unpack the phrase but also to find interpretations that can inform and inspire resistance to the current worldwide assault on human rights. The book is called *'The Right to Have Rights.'*"); see also STEPHANIE DEGOOYER ET AL., *Introduction to THE RIGHT TO HAVE RIGHTS 1-2* (2018) (noting in the introduction that "[b]etween the ages of 27 and 45, Hannah Arendt was a stateless refugee"; that she traveled to the United States in 1941 "where she was granted asylum as a refugee" and, in 1951, "was naturalized" as a U.S. citizen; and that in 1951 she published her first English-language book, *The Origins of Totalitarianism*, in which she "reflected on what her experience as a stateless refugee had taught her about the ways in which individuals come to lose and gain rights"); MIRA L. SIEGELBERG, *STATELESSNESS: A MODERN HISTORY* 189, 192, 207 (2020) (discussing Hannah Arendt's writings on the "right to have rights"); ALISON KESBY, *THE RIGHT TO HAVE RIGHTS: CITIZENSHIP, HUMANITY, AND INTERNATIONAL LAW* 2-6 (2012) (same); KENNETH W. JOST, *THE SUPREME COURT A TO Z* 93 (5th ed. 2012) ("Citizenship was described by Chief Justice Earl Warren in 1958 as 'man's basic right for it is nothing less than the right to have rights.'").

455. *Annan Supports Halt to Death Penalty*, WASH. POST (Dec. 19, 2000), <https://www.washingtonpost.com/archive/politics/2000/12/19/annan-supports-halt-to-death-penalty/ab7ce520-1033-4f30-9fac-94f71d93a567/>.

456. James Masters, *Donald Trump says torture 'absolutely works'—but does it?*, CNN POLITICS (Jan. 26, 2017, 11:37 AM), <https://www.cnn.com/2017/01/26/politics/donald-trump-torture-waterboarding/index.html>.

457. Erika Guevara Rosas, *Rebuilding from the ashes, Trump's heritage on immigration and asylum policy*, AMNESTY INT'L (Nov. 26, 2020, 1:44 PM), <https://www.amnesty.org/en/latest/news/2020/11/trumps-heritage-immigration-asylum-policy/> ("For four years the Trump administration has implemented policies that have time and again demonstrated its disregard for human rights and its desire to suppress the rights of specific groups for political gain. We have seen executive orders and federal policies passed, along with divisive and hateful rhetoric directed at women and girls, the LGBTQI+ community, Black and Latino people, migrants and refugees, among others."); Press Release, Human Rights First, *Trump Administration Enacts Rule Gutting Protection for Refugees and Asylum Seekers* (Dec. 10, 2020), <https://www.humanrightsfirst.org/press-release/trump-administration-enacts-rule-gutting-protection-refugees-and-asylum-seekers> ("In the waning days of the current administration, the Trump U.S. Departments of Homeland Security and Justice have rammed through a sweeping final rule, set to go into effect on January 11, 2021, that guts what remains of protection for refugees seeking asylum in the United States. This rule is a clear violation of the Immigration and Nationality Act, the intent of Congress, and the treaty obligations of the United States.").

but the Trump Administration's Justice Department—at the urging of Trump himself<sup>458</sup>—decided to bring back the federal death penalty with a vengeance after a hiatus of more than seventeen years.<sup>459</sup> “Death penalty all the way,” Trump said at a February 2016 presidential campaign event, adding, “I’ve always supported the death penalty.”<sup>460</sup> And the Justice Department's top lawyer later followed up on Trump's rhetoric. On July 25, 2019, then-Attorney General William Barr directed the Bureau of Prisons to schedule five executions,<sup>461</sup> three of which were later scheduled for mid-July of 2020.<sup>462</sup>

In the midst of the coronavirus pandemic, the U.S. Government then made concrete plans to execute four men—Daniel Lee, Wesley Purkey, Dustin Honken, and Keith Nelson—in quick succession,<sup>463</sup> a plan somewhat reminiscent of when Arkansas, in 2017, planned to execute eight men over the course of just eleven days.<sup>464</sup> Even though

458. Michael Tarm & Michael Balsamo, *Trump ratchets up pace of executions before Biden inaugural*, ASSOCIATED PRESS (Dec. 7, 2020), <https://apnews.com/article/donald-trump-death-penalty-legacy-838932ac2b665b42373309336d130f56> (“Trump has been a consistent supporter of the death penalty.”). Throughout his life, Donald Trump has stoked racial division, notoriously advocating for the death penalty's use, including for the now-exonerated Central Park Five, a group of Black and Latino teenagers wrongfully convicted of sexually assaulting a white jogger in 1989 in Central Park. Nicholas Wu, *Trump doesn't apologize to Central Park Five: 'You have people on both sides of that'*, USA TODAY (June 19, 2019, 7:40 AM), <https://www.usatoday.com/story/news/politics/2019/06/19/trump-does-not-apologize-central-park-5-when-asked-reporter/1497075001/>; see also SARAH KENDZIOR, *HIDING IN PLAIN SIGHT: THE INVENTION OF DONALD TRUMP AND THE EROSION OF AMERICA* (2020) (e-book noting that in 1989 Donald Trump “notoriously took out a newspaper ad in multiple newspapers, including the *New York Daily News*, calling for the execution of five black and Latino boys, the Central Park Five, who were falsely accused of rape and battery”); David Bianculli, *'Central Park Five': Rape, Race And Blame Explored*, NPR (Apr. 16, 2013, 2:55 PM), <https://www.npr.org/2013/04/16/176686575/central-park-five-rape-race-and-blame-explored> (discussing *The Central Park Five* documentary).

459. E. Tammy Kim, *Trump's Final Cruelty: Executing Prisoners*, NEW YORKER (Nov. 25, 2020), <https://www.newyorker.com/news/daily-comment/trumps-final-cruelty-executing-prisoners>.

460. Isaac Arnsdorf, *Inside Trump and Barr's Last-Minute Killing Spree*, PROPUBLICA (Dec. 23, 2020, 5:53 PM), <https://www.propublica.org/article/inside-trump-and-barrs-last-minute-killing-spree>.

461. U.S. Dep't of Justice, *supra* note 388.

462. *The Federal Government Restarts Federal Executions Amid Procedural Concerns and a Pandemic*, DEATH PENALTY INFO. CTR. (July 20, 2020), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/the-federal-governments-2019-attempt-to-restart-federal-executions-an-analysis>.

463. *U.S. attorney general orders execution dates set for four federal inmates*, REUTERS (June 15, 2020, 4:05 PM), <https://www.reuters.com/article/us-usa-deathpenalty/u-s-attorney-general-orders-execution-dates-set-for-four-federal-inmates-idUSKBN23M36F> (“The inmates scheduled for execution are Daniel Lee on July 13, Wesley Purkey on July 15, Dustin Honkin on July 17 and Keith Nelson on Aug. 28.”).

464. Kelly P. Kissel, *Here are the 8 inmates Arkansas planned to execute in 11 days*, USA TODAY (Apr. 15, 2017, 1:06 PM), <https://www.usatoday.com/story/news/nation/2017/04/15/arkansas-prison-inmates-death->

multiple states—New York (2004),<sup>465</sup> New Jersey (2007),<sup>466</sup> New Mexico (2009),<sup>467</sup> Illinois (2011),<sup>468</sup> Connecticut (2012),<sup>469</sup> Maryland (2013),<sup>470</sup> Delaware (2016),<sup>471</sup> Washington (2018),<sup>472</sup> New Hampshire (2019),<sup>473</sup> Colorado (2020),<sup>474</sup> and Virginia (2021)<sup>475</sup>—have legislatively abolished or judicially outlawed the death penalty in recent years,<sup>476</sup> the Trump Administration took the U.S. Government in the

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row-executions/100500598/; Lawrence Hurley, *U.S. Supreme Court clears way for resumption of federal executions*, REUTERS (June 29, 2020), <https://www.reuters.com/article/us-usa-court-deathpenalty/u-s-supreme-court-clears-way-for-resumption-of-federal-executions-idUSKBN2401S5>.

465. JOSEPH A. MELUSKY & KEITH A. PESTO, *THE DEATH PENALTY: A REFERENCE HANDBOOK* 188 (2017) (“In 2004, New York’s highest court declared the state’s 1995 death penalty law invalid in *People v. LaValle* (2004).”); cf. JEFFREY L. KIRCHMEIER, *IMPRISONED BY THE PAST: WARREN MCCLESKEY AND THE AMERICAN DEATH PENALTY* 281 (2015) (“New York prosecutors in Queens, however, continued to pursue the death penalty under the unconstitutional statute in the case of John B. Taylor, who was involved in a restaurant robbery-murder . . . . After Taylor was sentenced to death, prosecutors argued on appeal that the sentence should stand . . . . But in 2007 in *People v. Taylor*, the Court of Appeals held that its prior ruling in *LaValle* applied to this one last condemned inmate. Thus, the death penalty could not be imposed in New York until the state legislature rewrote the statute. The decision cleared the state’s death row and halted further capital prosecutions in the state courts.”).

466. See generally Aaron Scherzer, *The Abolition of the Death Penalty in New Jersey and Its Impact on Our Nation’s “Evolving Standards of Decency”*, 15 MICH. J. RACE & L. 223 (2009).

467. ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 132 (5th ed. 2015).

468. *Id.*

469. *Id.*

470. *Id.*

471. Eyder Peralta, *Delaware Supreme Court Finds State’s Death Penalty Law Is Unconstitutional*, NPR (Aug. 2, 2016, 3:53 PM), <https://www.npr.org/sections/thetwo-way/2016/08/02/488409435/delaware-supreme-court-finds-states-death-penalty-laws-are-unconstitutional>.

472. Christine Clarridge & Lewis Kamb, *Death penalty struck down by Washington Supreme Court, taking 8 men off death row*, SEATTLE TIMES (Oct. 11, 2018, 10:40 PM), <https://www.seattletimes.com/seattle-news/death-penalty-opponents-cheer-washington-supreme-court-ruling-that-struck-punishment-down/>.

473. NHPR Staff, *N.H. Abolishes Death Penalty, As Legislature Overturns Governor’s Veto*, NHPR (May 30, 2019), <https://www.nhpr.org/post/nh-abolishes-death-penalty-legislature-overturns-governors-veto#stream/0>.

474. Jesse Paul & John Ingold, *Governor signs bill abolishing Colorado’s death penalty, commutes sentences of state’s 3 death row inmates*, COLO. SUN (Mar. 23, 2020, 3:53 PM), <https://coloradosun.com/2020/03/23/colorado-death-penalty-repeal/>.

475. Whitney Evans, *Virginia Governor Signs Law Abolishing The Death Penalty, A 1st In The South*, NPR (Mar. 24, 2021, 2:50 PM), <https://www.npr.org/2021/03/24/971866086/virginia-governor-signs-law-abolishing-the-death-penalty-a-1st-in-the-south>.

476. Throughout American history, a number of states have abolished the death penalty. See generally JOHN F. GALLIHER ET AL., *AMERICA WITHOUT THE DEATH PENALTY: STATES LEADING THE WAY* (2002); LARRY W. KOCH ET AL., *THE DEATH OF THE AMERICAN DEATH PENALTY: STATES STILL LEADING THE WAY* (2012). Other states have put a halt to carrying out executions. Ivan Pereira, *Virginia lawmakers introduce bill to abolish death penalty*, ABC



exact opposite direction.<sup>477</sup> As a CNN story reported on December 17, 2020 during the lame-duck period before Donald Trump left the White House: “For the first time in US history, the government has executed more people than all of the 50 states, and the number of federal prisoners put to death this year—10—is the highest since President Grover Cleveland’s second term in office, according to the Death Penalty Information Center.”<sup>478</sup> A total of thirteen federal death row inmates were put to death in rapid succession before Donald Trump left office.<sup>479</sup>

The death penalty’s use, when objectively analyzed, must be seen as totally at odds with the Rule of Law and core human rights principles. Along with other horrific corporal punishments, the death penalty—the State’s ultimate sanction—must be abolished worldwide if, in fact, *universal rights*—as expressed in the Universal Declaration of Human Rights (1948)—are not just to be *theorized* but to be made into a *reality*. That is because if nations and government officials are permitted to needlessly inflict cruelty upon or torture a human being—even one who has committed a heinous crime—or otherwise subject a person to inhumanity or degradation, then the right to be free from torture and the right to be free from cruel, inhuman or degrading treatment or punishment (as expressed in the Universal Declaration,<sup>480</sup> the International Covenant on Civil and Political Rights (“ICCPR”),<sup>481</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>482</sup> and other provisions of law such as the U.S.

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NEWS (Jan. 13, 2021, 4:30 PM), <https://abcnews.go.com/US/virginia-lawmakers-introduce-bill-abolish-death-penalty/story?id=75232327> (noting that California, Oregon and Pennsylvania have issued a moratorium on capital punishment).

477. Joanna Walters, ‘*Out of step*’: Trump rush to carry out executions sharply at odds with US trends, *GUARDIAN* (Dec. 12, 2020, 9:57 AM), <https://www.theguardian.com/world/2020/dec/12/trump-executions-death-penalty-us-public>.

478. Francesca Giuliani-Hoffman, *The US government has executed 10 people this year—the most since 1896*, *CNN POLITICS* (Dec. 17, 2020, 5:34 PM), <https://www.cnn.com/2020/12/17/politics/federal-death-penalty-2020-trnd/index.html>.

479. Barbara Campbell & Suzanne Nuyen, *U.S. Executes Dustin Higgs in 13th and Final Execution under Trump Administration*, *NPR* (Jan. 16, 2021, 1:56 AM), <https://www.npr.org/2021/01/16/957559566/u-s-executes-dustin-higgs-in-13th-and-final-execution-under-trump-administration>.

480. G.A. Res. 217 A, Universal Declaration of Human Rights, art. 5 (Dec. 10, 1948), <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

481. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 7. (Dec. 16, 1966), <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [hereinafter ICCPR].

482. G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1 (Dec. 10, 1984), <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx> (defines “torture” as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having

Constitution's Eighth Amendment)<sup>483</sup> are not, in fact, truly universal rights.<sup>484</sup>

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committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”); *id.*, art. 16 (“[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture . . .”).

483. U.S. CONST. amend. VIII.

484. John D. Bessler, *What I Think About When I Think About the Death Penalty*, 62 ST. LOUIS U. L. J. 781, 803 (2018) (noting that “[t]he Universal Declaration of Human Rights states: ‘[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’” and observing that if nations are allowed to torture convicted offenders or prisoners than rights are not truly universal). In Alabama, Missouri, North Carolina and Virginia, all death penalty states, *psychological torture* is already defined by courts in those states as an awareness of one’s impending death but being helpless to prevent that death. *Shanklin v. State*, 187 So. 3d 734, 808 (Ala. Crim. App. 2014) (citing *Ex parte Key*, 891 So. 2d 384, 390 (Ala. 2004)) (“Psychological torture can be inflicted where the victim is in intense fear and is aware of, but helpless to prevent impending death.”); *State v. Sloan*, 756 S.W.2d 503, 511 (Mo. 1988) (en banc) (finding “sufficient evidence of psychological torture” where the jury could have believed the victim had heard prior gunshots, was in a “hopeless” situation, and “had the opportunity to anticipate and reflect upon his impending death while his parents and brother were shot”); *State v. McNeill*, 624 S.E.2d 329, 339 (N.C. 2006) (noting that killings that involve the infliction of psychological torture leave the victim “in her last moments aware of, but helpless to prevent, impending death”); *State v. Alston*, 461 S.E.2d 687, 718-19 (N.C. 1995) (finding murder was “especially heinous, atrocious, or cruel” because of presence of “evidence of psychological terror” that including prior death threats and that left the victim, in the last moments of her life, struggling to breathe, making her “aware of, but unable to prevent, her impending death”); *Lawlor v. Commonwealth*, 738 S.E.2d 847, 887 (Va. 2013) (“The psychological aspect of torture may be established, for example, ‘where the victim is in intense fear and is aware of, but helpless to prevent, impending death . . . for an appreciable lapse of time.’”) (quoting *Ex parte Key*, 891 So. 2d at 390); see also Bessler, *Taking Psychological Torture Seriously*, *supra* note 444, at 72-73 (discussing the case law used in criminal cases to define psychological torture). Although the Convention Against Torture and U.S. law has a “lawful sanctions” carve-out to the definition of torture, see *id.* at 10 & n.30, 82 & n.360, 88-94, if state actors are allowed to engage in acts that, in another context, are already considered *psychological torture* because of their inherent characteristics, then the ideal of the Rule of Law—that no one is above the law and that there should be equality of treatment—is perverted. *Id.* at 86 n.369 (“In the death penalty context, a death row inmate is fully aware of his or her impending death—and is helpless to prevent that death—for substantially longer than a typical victim of torture-murder. The heinous actions of torture-murderers are inexcusable, but those actions do not justify the use of torture against already-incarcerated inmates. Acts of torture should be prohibited in all circumstances.”). Compare THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL: A COMMENTARY 463 (Manfred Nowak, Moritz Birk & Giuliana Monina, eds., 2d ed. 2019) (“One can . . . conclude that corporal punishment, as a judicial or disciplinary sanction, committed by the State or with its acquiescence is nowadays considered a form of ill-treatment prohibited by international law confirmed by the Committee against Torture, the Human Rights Committee, the Committee on the Rights of the Child, and the UN Special Rapporteur on Torture, as well as regional human rights mechanisms such as the Inter-American Court of Human Rights, the European Court of Human Rights, and European Committee of Social Rights. The *lawful sanctions clause* in Article 1 CAT [Convention Against Torture] cannot be invoked as a legal justification for corporal punishment. States that practise corporal punishment as a judicial or disciplinary measure or that do not take

The modern definition of *torture* clearly establishes that torture can be either physical or psychological in nature.<sup>485</sup> Accounts of botched executions, resulting in physically torturous and excruciating inflictions of pain, are all too common.<sup>486</sup> But death sentences and state-sanctioned executions also inflict severe psychological torment and trauma.<sup>487</sup> Indeed, because of their severity, credible death threats have already been found to be torturous in nature in contexts outside of the realm of capital punishment.<sup>488</sup> For example, *mock executions*—that is, simulated executions where a person or a person’s loved one is led to believe that an execution is about to occur—have already been outlawed and classified under the rubric of psychological torture.<sup>489</sup> If using a *fake* execution or making credible threats of death are already considered to be totally unacceptable and illegal in the non-death penalty context, how is it that the law still permits the making of capital charges and the infliction of death sentences? Capital charges and death sentences are both, after all, nothing more than highly credible threats of death, especially since they are backed by the enormous power of the State. Of course, as a scheduled execution date approaches and an execution becomes imminent, the menacing nature of the state-administered death threat—and the accompanying psychological torment and terror associated with it—increases exponentially.<sup>490</sup> Just as it is an act of torture to kill a helpless or defenseless victim in the non-state actor context where the individual is made aware of his or her death in advance and is utterly powerless to stop the killing, it should be considered an act of torture to deliberately kill an inmate who is already incarcerated and tied down on a gurney at the moment of his or her death.<sup>491</sup>

In the twenty-first century, the concept of the Rule of Law must be employed to combat all forms of torture, cruelty, discrimination, and arbitrariness. Since the Enlightenment and Cesare Beccaria’s call in *On Crimes and Punishments* for the death penalty’s abolition, there has been

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effective measures to prohibit and prevent it in the private sphere thus violate the prohibition of ill-treatment.”), *with id.* at 464 (“[T]he ECtHR is the first international human rights court which clearly states that capital punishment is nothing but an aggravated form of corporal punishment and therefore, in any case, constitutes a cruel and inhuman punishment in violation of the right to dignity. On the other hand, the UN treaty bodies are still struggling with this issue.”).

485. Bessler, *Taking Psychological Torture Seriously*, *supra* note 444, at 3.

486. *See generally* AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY (2014).

487. *See* Bessler, *Taking Psychological Torture Seriously*, *supra* note 444, at 9-10.

488. *Id.* at 11-12.

489. *Id.* at 12.

490. *Id.* at 35-60.

491. *Id.* at 3, 7, 12-13, 32-34, 38-60.

a concerted effort to put to end to the death penalty's use.<sup>492</sup> That effort is still ongoing, with the United Nations adopting multiple resolutions calling for a moratorium on executions<sup>493</sup> and international organizations having been formed to expose the death penalty's inhumanity and fatal flaws.<sup>494</sup> But if universal human rights and constitutional rights are to be actualized in practice, and not just put on paper,<sup>495</sup> then people—and lawmakers, lawyers, and judges in particular—must insist upon change.<sup>496</sup> Indeed, to better ensure that the brutality of the past is abandoned, the law—including international law through the recognition

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492. See generally John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J. L. & SOC. POL'Y 195 (2009), <http://scholarlycommons.law.northwestern.edu/njls/vol4/iss2/1/>.

493. European External Action Service Press Release, 201217\_20, Death penalty: Statement by the Spokesperson on the UN General Assembly's Resolution on a moratorium on the use of death penalty (Dec. 17, 2020), <https://eeas.europa.eu/headquarters/headquarters-homepage/en/90793> ("The adoption of the Resolution 'Moratorium on the use of death penalty' at the UN General Assembly on 16 December is an important achievement for the abolitionist cause worldwide. The record number of 123 votes in favour, up from 104 when a Resolution was first adopted in 2007, is further confirmation of the growing consensus on this issue. The death penalty is a cruel and inhuman punishment that neither deters violent crime nor contributes to a safer society. On the contrary, killing as a punishment perpetuates a cycle of senseless violence.").

494. ECPM, <http://www.ecpm.org/en/> (last visited Mar. 10, 2021); *International Commission Against Death Penalty*, <http://www.icomdp.org> (last visited Mar. 10, 2021); *World Coalition Against the Death Penalty*, <http://www.worldcoalition.org/fr/> (last visited Mar. 10, 2021).

495. See also LANCE BANNING, JEFFERSON AND MADISON: THREE CONVERSATIONS FROM THE FOUNDING 10 (1995) (noting that James Madison noted that "[r]epeated violations" of "parchment barriers" have been "committed by overbearing majorities in every state"; "In Virginia," he observed, "I have seen the bill of rights violated in every instance where it has been opposed to a popular current."); *id.* at 21 (" 'Paper barriers' or 'parchment declarations,' Madison insisted, would become substantial only in so far as they were manned by citizens who were informed enough, and vigilant enough, to stand behind these ramparts."); THE QUOTABLE FOUNDING FATHERS: A TREASURY OF 2,500 WISE AND WITTY QUOTATIONS FROM THE MEN AND WOMEN WHO CREATED AMERICA 46 (Buckner F. Melton, Jr. ed., 2004) (Thomas Jefferson to Joseph Priestley (June 19, 1802)) ("Tho' written constitutions may be violated in moments of passion or delusion, yet they furnish a text to which those who are watching may again rally & recall the people: they fix too for the people the principles for their political creed.").

496. *New York State Board of Elections v. López Torres*, 552 U.S. 196, 213 (2008) (Kennedy, J., concurring) ("Rule of law is secured only by the principled exercise of political will.").

of a *jus cogens* norm against capital punishment<sup>497</sup>—must strictly forbid death sentences and executions.<sup>498</sup>

In the past, the concept of torture was not thought to encompass corporal punishments such as the pillory, whipping, the stocks, or ear cropping or, for that matter, death sentences or executions (even though death sentences and executions, as I’ve pointed out at length elsewhere, carry all the characteristics or indicia of torturous practices).<sup>499</sup> For example, the Massachusetts Body of Liberties (1641) contained a provision that, while generally forbidding torture to be used to extract confessions, explicitly allowed torture to be used in capital cases.<sup>500</sup>

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497. See Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (“[A] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”); ERIC A. ENGLE, PRIVATE LAW REMEDIES FOR EXTRATERRITORIAL HUMAN RIGHTS VIOLATIONS 38 n.4 (2006) (“A *jus cogens* norm is a special type of customary international law. A *jus cogens* norm ‘is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’”) (quoting *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 714 (9th Cir. 1992)); see also LAURELYN WHITT & ALAN W. CLARKE, NORTH AMERICAN GENOCIDES: INDIGENOUS NATIONS, SETTLER COLONIALISM, AND INTERNATIONAL LAW 31 n.29 (2019) (“*Jus cogens* norms are peremptory norms under international law from which no derogation is permitted. Prohibitory *jus cogens* norms include genocide, torture, and the execution of juveniles.”); 2 INTERNATIONAL CRIMINAL LAW: MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS 169 (M. Cherif Bassiouni ed., 3d ed. 2008) (“The *jus cogens* international crimes . . . in the order of their emergence in international criminal law are: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against humanity; (5) genocide; (6) apartheid; and (7) torture.”); ANIEL CARO DE BEER, PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (*JUS COGENS*) AND THE PROHIBITION OF TERRORISM 86 (2019) (“The fact that no state may derogate from *jus cogens* norms may serve as a testament to the universal character of *jus cogens* norms. *Jus cogens* norms have been described as ‘universally binding by their very nature.’”); DANIEL COSTELLOE, LEGAL CONSEQUENCES OF PEREMPTORY NORMS IN INTERNATIONAL LAW 12-14 (2017) (discussing the *jus cogens* concept).

498. See generally Bessler, *The Abolitionist Movement Comes of Age*, *supra* note 453; John D. Bessler, *The Law’s Evolution: From Medieval Executions to a Peremptory, International Law Norm Against Capital Punishment*, 3 BECCARIA: REVUE D’HISTOIRE DU DROIT DE PUNIR 255 (2017); John D. Bessler, *The American Enlightenment: Eliminating Capital Punishment in the United States*, in CAPITAL PUNISHMENT: A HAZARD TO A SUSTAINABLE CRIMINAL JUSTICE SYSTEM? (Lill Scherdin ed., 2014); see also John D. Bessler, *The Long March Toward Abolition: From the Enlightenment to the United Nations and the Death Penalty’s Slow Demise*, 29 U. FLA. J.L. & PUB. POL’Y 1 (2019) (describing the evolution of the anti-death penalty movement).

499. See generally BESSLER, THE DEATH PENALTY AS TORTURE, *supra* note 444.

500. The Massachusetts Body of Liberties contained a provision declaring “[f]or bodilie punishments we allow amongst us none that are inhumane Barbarous or cruel.” JOSEPH A. MELUSKY & KEITH A. PESTO, CRUEL AND UNUSUAL PUNISHMENT: RIGHTS AND LIBERTIES UNDER THE LAW 38 (2003); *cf. id.* at 37-38 (noting that, under English law, “it was lawful to torture a defendant by a combination of starvation, thumbscrews, and *peine forte et dure*, that

Notably, Beccaria himself wrote about his opposition to torture and capital punishment in separate chapters of his book.<sup>501</sup> Although some locales abolished torture and capital punishment at the same time,<sup>502</sup> many countries that outlawed torture during the Enlightenment did not simultaneously abolish capital punishment, showing that executions were not then viewed as torturous acts or a lethal subset of torture as then defined.<sup>503</sup>

The law can be slow to change, just as it takes time for a country—or the international system—to build up a Rule of Law ethic and tradition. The non-binding Universal Declaration of Human Rights, while generically protecting the “right to life,”<sup>504</sup> makes no reference to

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is, ‘punishment hard and long’ by loading weights on the spreadeagled defendant’s chest until he should consent” to enter a plea, and observing: “‘Pressing,’ in fact, was used as late as 1692 in Massachusetts during the Salem witch trials and was not legally abolished until 1772. Other forms of torture were permitted in the colonies as investigative methods. Although the common law courts traditionally did not employ torture, it was considered lawful for the Court of Star Chamber, which existed from 1487 to 1641, to use torture.”). Yet, another provision of the Massachusetts Body of Liberties also provided:

No man shall be forced by Torture to confesse any Crime against himselfe nor any other unlesse it be in some Capitall case where he is first fullie convicted by cleare and sufficient evidence to be guilty, After which if the cause be of that nature, That it is very apparent there be other conspiratours, or confederates with him, Then he may be tortured, yet not with such Tortures as be Barbarous and inhumane.

MICHAEL TUGENDHAT, LIBERTY INTACT: HUMAN RIGHTS IN ENGLISH LAW 96 (2017).

501. John D. Bessler, *The American Death Penalty: A Short (But Long) History*, in ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT ch. 1 (Robert M. Bohm & Gavin Lee eds., 2017).

502. THE ENLIGHTENMENT: A SOURCEBOOK AND READER 217 (Paul Hyland et al. eds., 2003) (“Beccaria’s work had a profound impact on Enlightenment thinking about jurisprudence, and helped pave the way for major penal reforms over the next two centuries. His ideas were adopted by the National Assembly of France in 1789 as Article VIII of its ‘Declaration of the Rights of Man and of the Citizen’, and his influence can be seen in many legal reforms, such as Catherine the Great’s *Instruction* (1767), and the Criminal Code of 1786 introduced by Grand Duke Leopold of Tuscany, which abolished capital punishment and torture.”).

503. Bessler, *The Abolitionist Movement Comes of Age*, *supra* note 453, at 9 (“The first jurisdictions to abolish torture were Sweden in 1734 and Prussia in the 1740s and 1750s, but it was only after the publication of Beccaria’s book that Western European nations began doing away with the punishment of death.”).

504. Universal Declaration of Human Rights, *supra* note 480, at art. 3 (“Everyone has the right to life, liberty and security of person.”); *see also* WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD’S COURTS 202 (1996) (“Those who originally conceived the modern enumerations of fundamental rights and freedoms approached capital punishment from the standpoint of the right to life. Unlike the prohibition of cruel treatment and torture—which had been expressed as early as 1641 in the Massachusetts Body of Liberties, and reiterated in such instruments as the English Bill of Rights of 1689, the French *Déclaration des droits de l’homme et du citoyen* of 1789, and the American Bill of Rights of 1791—the right to life was very much a new idea. It was included in the Universal Declaration of Human Rights of 1948, although its scope was unclear and its eventual ramifications unknown. The drafters of the Universal Declaration believed the death penalty to be an implied limit on the right to life,

capital punishment;<sup>505</sup> the widely ratified ICCPR also references the right to life<sup>506</sup> while simply restricting the death penalty's use,<sup>507</sup> not absolutely demanding the death penalty's immediate and complete abolition even as it contemplated the eventual demise of capital punishment;<sup>508</sup> and when ratifying or acceding to the Convention

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one that was dictated by existing circumstances and one that would be only temporary. They envisaged its limitation and eventual abolition as interpretation of the Universal Declaration—humanity's common standard of achievement—evolved over time.”).

505. See, e.g., William A. Schabas, *The United Nations and Abolition of the Death Penalty*, in *AGAINST THE DEATH PENALTY: INTERNATIONAL INITIATIVES AND IMPLICATIONS* 10-11 (2016) (“The issue of capital punishment was debated at considerable length by the Commission on Human Rights and the General Assembly in the course of adoption of the *Universal Declaration of Human Rights*, during 1947 and 1948. This was the first significant consideration of the death penalty within the United Nations. In its final version, article 3 of the Universal Declaration states: ‘Everyone has the right to life, liberty and security of person’. However, the original draft of this provision, prepared by John P. Humphrey in early 1947, recognised a right to life that ‘can be denied only to persons who have been convicted under general law of some crime to which the death penalty is attached’. Eleanor Roosevelt, who chaired the Drafting Committee of the Commission on Human Rights, cited movement underway in some states to abolish the death penalty, and suggested that it might be better not to make any explicit mention of capital punishment as an exception to the right to life. René Cassin reworked Humphrey’s draft and removed the reference to the death penalty.”).

506. ICCPR, *supra* note 481, art. 6(1) (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”).

507. *Id.* art. 6(2) (“In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.”); *id.* art. 6(4) (“Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.”); *id.* art. 6(5) (“Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”).

508. *Id.* art. 6(6) (“Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.”); see also General Comment No. 36: Right to Life, ¶ 50, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) (“Article 6 (6) reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable and necessary for the enhancement of human dignity and progressive development of human rights.”); *id.* at ¶ 51 (“Although the allusion to the conditions for application of the death penalty in article 6 (2) suggests that when drafting the Covenant, the States parties did not universally regard the death penalty as a cruel, inhuman or degrading punishment per se, subsequent agreements by the States parties or subsequent practice establishing such agreements may ultimately lead to the conclusion that the death penalty is contrary to article 7 of the Covenant under all circumstances. The increasing number of States parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, other international instruments prohibiting the imposition or carrying out of the death penalty, and the growing number of non-abolitionist States that have nonetheless introduced a de facto moratorium on the exercise of the death penalty, suggest that considerable progress may have been made towards establishing an agreement

Against Torture, the United States, in its reservations, understandings and declarations (“RUDs”), purported to preserve its right to continue to use capital punishment<sup>509</sup> even as other countries<sup>510</sup> and Europe’s regional human rights system<sup>511</sup> have abandoned the death penalty’s use, asserting that executions violate basic human rights and international law protections.<sup>512</sup> In fact, decades ago, the Amnesty International-inspired Declaration of Stockholm (1977) specifically declared that

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among the States parties to consider the death penalty as a cruel, inhuman or degrading form of punishment. Such a legal development is consistent with the pro-abolitionist spirit of the Covenant, which manifests itself, inter alia, in the texts of article 6 (6) and the Second Optional Protocol.”).

509. Among other things, the RUDs of the United States state: (1)

That the United States considers itself bound by the obligation under article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’, only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

and (2)

That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment §§ (I)(1), (II)(4) (Dec. 10, 1984), <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9-en.pdf> (declarations and reservations).

510. See, e.g., *Abolitionist and Retentionist Countries as of July 2018*, AMNESTY INT’L, <https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf> (last visited Mar. 10, 2021) (“More than two-thirds of the countries in the world have now abolished the death penalty in law or practice.”); *Death Penalty*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, <https://www.deathpenaltyworldwide.org> (last visited Mar. 10, 2021) (containing a map depicting the status of the death penalty around the world and showing abolitionist vs. retentionist countries).

511. Kerry Ann Akers & Peter Hodgkinson, *A Critique of Litigation and Abolition Strategies: A Glass Half Empty*, in CAPITAL PUNISHMENT: NEW PERSPECTIVES 35 (Peter Hodgkinson ed., 2016) (noting that “[t]he Council of Europe, being the architect of European human rights activism since the Second World War” has led “the European assault on capital punishment,” with “all but one of its 47 member states (the Russian Federation) ratifying the 6th Protocol of the European Convention of Human Rights (ECHR) and 43 having ratified the 13th Protocol of the ECHR, which abolishes the death penalty in all circumstances.”); see also Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, E.T.S. No. 114 (1983); Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, E.T.S. No. 187 (2002).

512. See generally Juan E. Méndez, *The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment*, 20 HUM. RTS. BRIEF, 2012, <https://digitalcommons.wcl.american.edu/hrbrief/vol20/iss1/1/>.



“[t]he death penalty is the ultimate cruel, inhuman and degrading punishment and violates the right to life.”<sup>513</sup>

#### X. HINDSIGHT AND A CRYSTAL BALL: THE PAST AND FUTURE OF THE RULE OF LAW

Over the course of human history, constitutions and law codes have blatantly discriminated against minorities, women, and LGBTQ+ members or, as in colonial and early America, provided for horrific body punishments such as branding, ear cropping, whipping or the pillory.<sup>514</sup> There have been “Jim Crow” laws,<sup>515</sup> state-sponsored segregation,<sup>516</sup> and other overt and highly discriminatory state practices throughout the world,<sup>517</sup> with the State of Oregon’s 1857 constitution and its early

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513. *Conference on the Abolition of the Death Penalty: Declaration of Stockholm* (Amnesty International, 11 December 1977), in *ETHICAL CODES AND DECLARATIONS RELEVANT TO THE HEALTH PROFESSIONS: AN AMNESTY INTERNATIONAL COMPILATION OF SELECTED ETHICAL AND HUMAN RIGHT TEXTS* 69 (4th rev. ed. 2000), <https://www.amnesty.org/download/Documents/132000/act750052000en.pdf>. The Declaration of Stockholm was produced at an Amnesty International-sponsored conference on the death penalty’s abolition in which more than 200 delegates and participants from Africa, Asia, the Caribbean, Europe, the Middle East and North and South America attended. *Id.*

514. 1 HISTORY OF ALLEGHENY COUNTY, PENNSYLVANIA 244 (2008) (noting punishments included “whipping, standing in the pillory or stocks, cropping the ears and branding,” and that “[t]he whipping-post, which stood in front of the jail, was a stout sapling placed firmly in the ground, with a crosspiece above the head, to which the hands of the culprit were tied, while the lashes were inflicted by the sheriff on his bare back”); *see also* Emily Cock, *Proportionate Maiming: The Origins of Thomas Jefferson’s Provisions for Facial Disfigurement in Bill 64*, 27 *TRANSACTIONS OF THE ROYAL HIST. SOC.* 127, 129, 145 (2019) (describing Thomas Jefferson’s proposed use of maiming offenders and nose-cutting to punish women convicted of specific offenses and observing, “The use of disfiguring punishments was by no means unknown in either Europe or America, even if Jefferson was a lone voice for the *lex talionis*. Branding the hand for benefit of clergy remained a key form of both judicial discretion and physical marking employed by British and American courts, and Arthur Scott demonstrated its frequent use in pre-revolutionary Virginia.”).

515. REMEMBERING JIM CROW: AFRICAN AMERICANS TELL ABOUT LIFE IN THE SEGREGATED SOUTH 1 (William H. Chafe et al. eds., 2001); *see also* F. MICHAEL HIGGINBOTHAM, *GHOSTS OF JIM CROW: ENDING RACISM IN POST-RACIAL AMERICA* 87 (2013) (noting that “Jim Crow” was a character at minstrel shows attended by large audiences that “saturated the country with notions of black inferiority,” and observing: “While there are no historical references identifying who first applied the term ‘Jim Crow’ to segregation laws, the term caught on fast. By 1900, Jim Crow was widely used as the informal term to describe any law, custom, or practice that intentionally separated racial minorities from whites.”).

516. *See generally* RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

517. *E.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (10th anniversary ed. 2020) (discussing various forms of racial discrimination); *see generally* DISCRIMINATION IN AN UNEQUAL WORLD (Miguel Angel Centeno & Katherine S. Newman eds., 2010) (discussing racial and gender discrimination around the world); FRED E. JANDT, *AN INTRODUCTION TO INTERCULTURAL*

laws—as just one of many examples—expressly excluding African Americans from living in the state.<sup>518</sup> Early American laws specifically governing enslaved persons,<sup>519</sup> forbidding inter-racial marriage<sup>520</sup> or voting or property ownership by women,<sup>521</sup> and criminalizing homosexual acts<sup>522</sup> or forbidding same-sex marriage<sup>523</sup> exemplify the extreme brutality, abuse, and blatant discrimination that the law, in tyrannous hands, is—and always has been—capable of.<sup>524</sup>

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COMMUNICATION: IDENTITIES IN A GLOBAL COMMUNITY 272-74 (7th ed. 2013) (discussing discriminatory practices against women in Saudi Arabia).

518. R. Gregory Nokes, *Oregon's Slave History*, in JILL STRAUSS & DIONNE FORD, *SLAVERY'S DESCENDANTS: SHARED LEGACIES OF RACE AND RECONCILIATION* 47, 50 (2019) (noting that Oregon passed exclusion laws in the 1840s and 1850s to prohibit African Americans from settling in Oregon, and that Oregon's 1857 constitution—in what constitutes “a scar on Oregon's history”—contained an exclusion clause as well); OREGON BLUE BOOK CONTAINING OFFICIAL DIRECTORY OF STATE, DISTRICT AND COUNTY OFFICERS AND THE CONSTITUTION 49, 53 (Frank W. Benson & Ben W. Olcott comps. eds., 1911) (noting that Oregon's 1857 constitution declared in section 35 that “No free negro or mulatto, not residing in this State at the time of the adoption of this Constitution, shall come, reside or be within this State, or hold any real estate, or make any contracts, or maintain any suit therein . . .”).

519. BESSLER, *CRUEL AND UNUSUAL*, *supra* note 137, 2 (2012) (noting that early American slave codes, on their face, “punished blacks more severely than whites” for crimes).

520. PAUL R. SPICKARD, *MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA* 374 (1989) (listing American states that once prohibited inter-racial marriage); *see also* GEOFFREY R. STONE & DAVID A. STRAUSS, *DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT* 114 (2020) (“*Loving v. Virginia* declared unconstitutional a Virginia law that forbade interracial marriage.”).

521. *WOMEN IN THE AMERICAN POLITICAL SYSTEM: AN ENCYCLOPEDIA OF WOMEN AS VOTERS, CANDIDATES, AND OFFICE HOLDERS* 157 (Dianne G. Bystrom & Barbara Burrell eds., 2018) (“At the beginning of the first feminist movement, women were legally barred from owning property, executing wills or signing legal documents, voting in elections, serving on juries (even if the defendant was a woman), refusing to have sex with their husbands, having legal custody of their children (both children and wives were legally owned by husbands), divorcing their husbands, and attending a college or university.”).

522. KATHLEEN J. FITZGERALD & KANDICE L. GROSSMAN, *SOCIOLOGY OF SEXUALITIES* 117 (2d ed. 2021) (“The first law outlawing male sodomy was known as the Buggery Act and was passed in England in 1533. At the time, it was considered both a sin and a crime. The original 13 colonies took their laws from English common law, including the criminalization of sodomy, which was punishable by death.”).

523. *See generally* DEBBIE CENZIPER & JIM OBERGEFELL, *LOVE WINS: THE LOVERS AND LAWYERS WHO FOUGHT THE LANDMARK CASE FOR MARRIAGE EQUALITY* (2016); *see also* FREDERICK HERTZ & EMILY DOSKOW, *MAKING IT LEGAL: A GUIDE TO SAME-SEX MARRIAGE, DOMESTIC PARTNERSHIPS AND CIVIL UNIONS* 8 (5th ed. 2018) (“In 1969, the historic Stonewall riots took place in New York City—the first time in the United States that the LGBT community fought back visibly and powerfully against oppression and homophobia. It was a time of enormous social change and agitation, with liberation movements breaking out in the women's community and other marginalized communities everywhere.”).

524. The brutality of state-sanctioned executions, long associated with racial prejudice, is another example of how the law has been misused throughout history, including to oppress racial minorities. *See, e.g.*, CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 19 (2016) (“The use of torturous execution

Nation-states and their political subdivisions are constantly debating and adopting new rules of law to govern members of society. In those debates, whether on tax or health care policy, voting rights, immigration, criminal justice or policing reform, income inequality, or racial justice or gender equity, the ideal of the Rule of Law—one focused on equality, fair treatment, inclusive participation, separation of powers, an independent judiciary, and the protection of human rights—should always weigh heavily into the calculus.<sup>525</sup> The U.S. Constitution's Fourteenth Amendment already guarantees "equal protection of the laws,"<sup>526</sup> with a variety of international conventions and treaties not only ensuring equality of treatment,<sup>527</sup> but insisting upon the protection of many other fundamental rights, including the rights to be free from torture and cruel, inhuman and degrading treatment or punishment<sup>528</sup> and to be free from discrimination.<sup>529</sup> Written codes, however, must be

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methods such as burning at the stake, as well as the public display of corpses or body parts of those executed for slave revolt, were clearly meant as dire warnings to slaves about the harsh consequences of insurrection or violence against slave owners.").

525. Muhamad Muqraby, *Some Impediments to the Rule of Law in the Middle East and Beyond*, 26 *FORDHAM INT'L L.J.* 771, 771 (2003) ("In democracies, the rule of law is essential for safeguarding the ability and right of citizens to participate in the process of government. It provides security from and against unlawful interference by the government such as arbitrary arrest, curtailment of free speech and freedom of association, and similar abuses. . . . Without the rule of law, there is little or no possibility for a defense by the individual against the power of the State. Hence, the accent of the rule of law, like human rights, is on the individual. Thus, the rule of law is also about equality before the law and equal protection under the law.").

526. HOWARD BALL, *A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA* 3 (1998) ("The Fourteenth Amendment, ratified in 1868, was a direct response to Black Codes enacted in localities across the South after 1865 to control and limit the legal and political status—and conduct—of their recently freed slaves. In some cases, these codes 'amounted to a virtual re-enslavement of blacks.' They deprived African Americans of their basic individual rights."). For a snapshot of the legal landscape as regards individual rights under state constitutions in 1868, see generally Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 *TEX. L. REV.* 7 (2008).

527. *E.g.*, Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/34/46, at 193 (Sept. 3, 1979); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/RES/2106A (XX) (Jan 4., 1965); *see also* ICCPR *supra* note 481, art. 3 ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.").

528. *E.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (June 26, 1987); ICCPR *supra* note 481, art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.").

529. *See generally* MPOKI MWAKAGALI, *INTERNATIONAL HUMAN RIGHTS LAW AND DISCRIMINATION PROTECTIONS: A COMPARISON OF REGIONAL AND NATIONAL RESPONSES* (2018). The United States has ratified a number of international human rights treaties,

combined with vigorous activism and continual demands for equality of treatment, including for the most marginalized members of a society. The failure to pass comprehensive immigration reform and the DREAM Act,<sup>530</sup> as well as the despicable violence against transgender people, including the spate of horrific murders that America has witnessed, illustrates just how far societies have yet to go to achieve true equality.<sup>531</sup>

The importance of the Rule of Law has long been emphasized, including by civic and political leaders of different political persuasions

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including the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but its obligations under those treaties have not been fully implemented. John Quigley, *Toward More Effective Judicial Implementation of Treaty-Based Rights*, 29 FORDHAM INT'L L.J. 552, 574-75 (2006) ("When the Senate gave consent to ratification of the International Covenant on Civil and Political Rights ('ICCPR'), the Convention Against Torture, and the International Convention on the Elimination of All Forms of Racial Discrimination, it declared that their rights-guarantee provisions were not to be self-executing.").

530. Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L. REV. 101, 103 (2013) ("DREAMers take their name from the DREAM Act, legislation which has been introduced in Congress every year since 2001 without ever passing both chambers. Specifically, the bill creates a path to citizenship for youth who came to the United States before the age of sixteen . . .").

531. *Murders of Transgender People in 2020 Surpasses Total for Last Year In Just Seven Months*, NAT'L CTR. FOR TRANSGENDER EQUALITY (Aug. 7, 2020), <https://transequality.org/blog/murders-of-transgender-people-in-2020-surpasses-total-for-last-year-in-just-seven-months>.

around the globe.<sup>532</sup> But the law's discriminatory past,<sup>533</sup> including a series of blatantly discriminatory U.S. Supreme Court decisions,<sup>534</sup> must

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532. For example, President Dwight D. Eisenhower once observed: "In a very real sense, the world no longer has a choice between force and law. If civilization is to survive, it must choose the rule of law." JAMES TAYLOR RANNEY, *WORLD PEACE THROUGH LAW: REPLACING WAR WITH THE GLOBAL RULE OF LAW* 28 (2018). Likewise, at an address at Vanderbilt University on May 18, 1963, President John F. Kennedy took note of the obligation of citizens "to uphold the law." He called law "the adhesive force in the cement of society, creating order out of chaos and coherence in place of anarchy," and he made this observation: "Certain other societies may respect the rule of force—we respect the rule of law." JOHN F. KENNEDY, *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY – CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF THE PRESIDENT (JANUARY 20 TO NOVEMBER 22, 1963)* 406, 408 (1964). During his time in office, President Barack Obama had this to say on the subject in 2016: "[O]ne of the challenges of a democratic government is making sure that even in the midst of emergencies and passions, we make sure that rule of law and the basic precepts of justice and liberty prevail." Press Release, White House Office of the Press Sec'y, Remarks by President Obama and President Pena Nieto of Mexico in Joint Press Conference, (July 22, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/07/22/remarks-president-obama-and-president-pena-nieto-mexico-joint-press>. The late U.N. Secretary-General Kofi Annan also once put it this way: "Good, healthy democratic societies are built on three pillars: there's peace and stability, economic development, and respect for rule of law and human rights. And where all three are present, you stand a very good chance of making a go of it." "[T]he third and important pillar of rule of law and respect for human rights," he stressed in an interview with the *Financial Times*, must not be forgotten "because no country can long remain prosperous without that third pillar." Alec Russell, *Kofi Annan interview: the full transcript*, FIN. TIMES (May 16, 2011), <https://www.ft.com/content/c2d31f14-7caa-11e0-b9e3-00144feabdc0>.

533. Scott W. Howe, *Atoning for Dred Scott and Plessy While Substantially Abolishing the Death Penalty*, 95 WASH. L. REV. 737, 739 (2020) ("From early in the nineteenth century through well into the twentieth, the United States Supreme Court issued a series of opinions that undermined the efforts of African Americans to secure their physical protection, their dignity, and their progress. The Court decisions enabled the violent degradation of black persons and branded them as deeply inferior in a racial hierarchy favoring white supremacy. Primary examples include *Dred Scott v. Sanford* and *Plessy v. Ferguson*, which are widely viewed by historians and Supreme Court scholars as topping the list of the worst Supreme Court decisions ever rendered.").

534. *E.g.*, *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (holding African Americans are not U.S. citizens), *abrogated by* U.S. CONST. amend. XIV (1868) ("[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside"); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (denying a woman, Myra Bradwell, the right to practice law in spite of her Fourteenth Amendment challenge to a state supreme court's decision to refuse to allow her to practice law because of her gender, with Justice Bradley's concurring opinion stating that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life," that "[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother," and that "[t]his is the law of the Creator"), *abrogation recognized by* *Mueller v. Auker*, 576 F.3d 979, 998-99 (9th Cir. 2009) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)) (noting that "we emerged long ago from Justice Bradley's legal dark ages" and that *Reed v. Reed*, 404 U.S. 71 (1971), "which embraced women within the Fourteenth Amendment's guarantee of equal protection of the laws" meant that, "[f]inally, the law had shed its pretense of 'romantic paternalism,' which put women 'not on a pedestal, but in a cage'"); *Minor v. Happersett*, 88 U.S. 162 (1874) (confining the right to vote to men, and holding that a provision of a state

be confronted head-on, with both American lawmakers and judges—as well as lawyers and the public—taking responsibility to ensure that the laws (including in their administration) truly provide “EQUAL JUSTICE UNDER LAW,”<sup>535</sup> as the words engraved on the U.S. Supreme Court

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constitution limiting the vote to “male citizens” was not a violation of the U.S. Constitution), *abrogated by* U.S. CONST. amend. XIX (1920) (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.”); *Pace v. Alabama*, 106 U.S. 583 (1883) (upholding the constitutionality of an Alabama law barring inter-racial couples from marrying, living together, or having sexual relations), *overruled by* *McLaughlin v. Florida*, 379 U.S. 184, 187-96 (1964) (holding that a Florida criminal statute prohibiting an unmarried interracial couple from living together violated the equal protection of the laws guaranteed by the U.S. Constitution’s Fourteenth Amendment and stating that “*Pace* . . . has not withstood analysis in the subsequent decisions of this Court”) and *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that laws banning interracial marriage violate the Equal Protection and Due Process Clauses of the U.S. Constitution’s Fourteenth Amendment); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding state segregation laws on a “separate but equal” basis), *overruled by* *Brown v. Board of Education*, 347 U.S. 483, 494-95 (1954); *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding the forced sterilization of those with intellectual disabilities, with the ruling stating that “society can prevent those who are manifestly unfit from continuing their kind” and declaring that “three generations of imbeciles are enough”), *abrogation recognized by* *Chamul v. Amerisure Mutual Ins. Co.*, 486 S.W.3d 116, 121-22 (Tex. App. 2016) (noting that “[e]ugenics was a social movement that sought to control human heredity,” and that it was a “government-mandated involuntary sterilization program that led to the infamous 1927 case of *Buck v. Bell*,” where the U.S. Supreme Court “held that a ‘feeble-minded’ woman, who was said to have been born to a ‘feeble-minded’ mother and to have had a ‘feeble-minded’ child out of wedlock, did not have constitutional protection against involuntary sterilization”); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment of Japanese Americans during World War II), *overruled by* *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)) (observing that “[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority” and that “*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in law under the Constitution’”); *Baker v. Nelson*, 409 U.S. 810 (1972) (a one-line summary decision dismissing an appeal “for want of a substantial federal question,” the result of which was to exclude same-sex couples from marrying), *overruled by* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2585 (2015) (holding that same-sex couples may not be deprived of the fundamental right to marry); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the constitutionality of Georgia’s sodomy statute criminalizing homosexual activity), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

535. Elizabeth Garrett, *New Voices in Politics: Justice Marshall’s Jurisprudence on Law and Politics*, 52 HOW. L. J. 655, 690 (2009) (“Thurgood Marshall’s life—as a litigator and a jurist—is a testament to his commitment to the words engraved above the entrance to the Supreme Court building: Equal Justice Under Law. His jurisprudence relating to law and politics—elections, campaigns, and political parties—provides his vision of a well-functioning democracy where all citizens have the equal opportunity to participate, and change occurs in a somewhat orderly, but also somewhat chaotic, process through political institutions, overseen by an active independent judiciary.”); Harris Wofford, *The Legal Lion of Civil Rights*, 2 TEMP. POL. & CIV. RTS. L. REV. 161, 163 (1993) (“As the legal lion of the civil rights struggle, Thurgood Marshall died knowing how far the nation still has to go. We know it too. In recent years, we’ve seen incidents of racial intolerance in many areas of our

building in Washington, D.C. so alluringly promise. Indeed, if U.S. Supreme Court Justice Sonia Sotomayor's words—"I firmly believe in the rule of law as the foundation for all of our basic rights."<sup>536</sup>—are to be realized in our time, we must all, individually and collectively,<sup>537</sup> stand up *against* hate, bigotry, prejudice, and intolerance and be extremely vigilant about standing up *for* individual rights, equality, and the Rule of Law itself.<sup>538</sup>

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own state that remind us of the distance we have to travel before 'Equal Justice Under Law' is engraved not only on a building, but in our hearts.").

536. LEAH CARSON & JANE COFIE, *DOING SOCIAL STUDIES IN MORNING MEETING: 150 QUICK ACTIVITIES THAT CONNECT TO YOUR CURRICULUM* 117 (2017).

537. Through the centuries, the recognition and protection of human rights has only come about through collective action and struggle. George Ulrich, *Epilogue: Widening the Perspective on the Local Relevance of Human Rights*, in *THE LOCAL RELEVANCE OF HUMAN RIGHTS* 355 (Koen De Feyter et al. eds., 2011) ("In his *struggle theory of human rights* Christof Heyns develops a comprehensive account of both the historical origins and contemporary functions of human rights based on the notion of a direct symmetry between human rights and the principle of legitimate resistance to abuses of power. Human rights indicate the threshold above which it is necessary for otherwise law-abiding people to defy government authority and resort to 'self-help,' i.e., struggle. They preserve a memory of issues that have been identified in humanity in the course of history as 'fighting causes'. 'Human rights law', says Heyns, 'can usefully be understood as a collective effort to make self-help unnecessary, based on a hard look at the lessons of history about what human beings regard as fighting causes.'"); Christof Heyns, *A 'Struggle Approach' to Human Rights*, in *HUMAN RIGHTS, PEACE AND JUSTICE IN AFRICA: A READER* 15 (Christof Heyns & Karen Stefiszyn eds., 2009) ("It is said that, while it may be difficult to agree about what justice is, we find it easier to identify injustice, and in this way work our way through from human wrongs to human rights. The struggle approach follows this line of thinking and makes empirical experience, rather than theoretical constructions about its foundations, the starting point of trying to understand the concept of human rights. Any perception of human rights therefore reflects an empirical assessment of the 'fighting causes' or values so central to human existence that people across the borders of time and space have taken, and will eventually take matters into their own hands should these core interests not be protected."); Clifford Bob, *Introduction to Fighting for New Rights*, in *THE INTERNATIONAL STRUGGLE FOR NEW HUMAN RIGHTS* 3 (Clifford Bob ed., 2009) ("Adoption of a new right occurs when leading members of the movement accept a grievance they had previously ignored, devoting significant resources to it and in some case promulgating international legal codes to cover it. Adoption does not happen easily. Rather the aggrieved must persuade the rights movement of the claim's import and its validity as a distinct right."); *id.* at 4 ("We argue that the rise of new rights involves four distinct if overlapping activities. First, politicized groups frame long-felt grievances as normative claims. Second, they place these rights on the international agenda by convincing gatekeepers in major rights organizations to accept them. This is crucial because a handful of NGOs and international organizations hold much sway in certifying new rights. Third, states and international bodies, often under pressure from gatekeepers and aggrieved groups, accept the new norms. Finally, national institutions implement the norms."); *id.* at 5 ("Four sets of actors play the largest roles in these processes: claimants who seek new rights; major rights NGOs and international organizations, which act as gatekeepers; states, which may ratify such claims as international law and implement them as domestic law; and opponents who combat new rights.").

538. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 5 (2008) ("The Rule of Law is . . . a fragile but crucial ideal, and one that is appropriately invoked whenever governments try to get their way by arbitrary and oppressive action or by short-circuiting the

## XI. CONCLUSION

Donald Trump and his administration will forever be associated with anti-immigrant policies and racist rhetoric,<sup>539</sup> the denial of climate change and basic science,<sup>540</sup> the failure to tackle the issue of gun violence,<sup>541</sup> the advocacy and promotion of baseless conspiracy theories,<sup>542</sup> the attack on and ransacking of the U.S. Capitol (the very citadel of American democracy),<sup>543</sup> and brazen efforts to undermine the

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norms and procedures laid down in their countries' laws or constitution. Interfering with the courts, jailing someone without legal justification, detaining people without any safeguards of due process, manipulating the constitution for partisan advantage—all of these are seen as abuses of the Rule of Law.”). The concept of the Rule of Law itself continues to be vigorously debated and discussed in the legal profession, with scholars attempting to define it with more precision. See Stein, *supra* note 27, at 185 (“This Article contributes to the ongoing discourse by setting forth eight principles that form the central tenets of the rule of law.”); see also Dawn Johnsen, *Toward Restoring Rule-of-Law Norms*, 97 TEX. L. REV. 1205 (2019); see also Robin West, *Paul Gowder’s Rule of Law*, 62 ST. LOUIS U. L.J. 303 (2018) (reviewing PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* (2016)). That, in and of itself, is also valuable, for the more focus on the Rule of Law, the better.

539. See *Timeline of the Muslim Ban*, ACLU WASH., <https://www.aclu-wa.org/pages/timeline-muslim-ban> (last visited Mar. 10, 2021); see also Ted Hesson & Chris Kahn, *Trump pushes anti-immigrant message even as coronavirus dominates campaign*, REUTERS (Aug. 14, 2020, 3:03 AM), <https://www.reuters.com/article/us-usa-election-immigration-insight/trump-pushes-anti-immigrant-message-even-as-coronavirus-dominates-campaign-idUSKCN25A18W>.

540. See, e.g., Jeff Tollefson, *How Trump damaged science—and why it could take decades to recover*, NATURE (Oct. 5, 2020), <https://www.nature.com/articles/d41586-020-02800-9>; Alana Wise, *‘I Don’t Think Science Knows’: Visiting Fires, Trump Denies Climate Change*, NPR (Sept. 14, 2020, 5:47 PM), <https://www.npr.org/2020/09/14/912799501/i-dont-think-science-knows-visiting-fires-trump-denies-climate-change>; Scientific American Endorses Joe Biden, SCI. AM. (Oct. 1, 2020), <https://www.scientificamerican.com/article/scientific-american-endorses-joe-biden1/> (“Scientific American has never endorsed a presidential candidate in its 175-year history. This year we are compelled to do so. . . . The evidence and the science show that Donald Trump has badly damaged the U.S. and its people—because he rejects evidence and science. The most devastating example is his dishonest and inept response to the COVID-19 pandemic . . .”).

541. See Steve Benen, *Despite recent promises, Trump abandons blueprint for gun reforms*, MSNBC (Nov. 1, 2019, 7:39 AM), <https://www.msnbc.com/rachel-maddow-show/despite-recent-promises-trump-abandons-blueprint-gun-reforms-msna1298246>.

542. See Shirin Ghaffary, *The long-term consequences of Trump’s conspiracy theory campaign*, VOX (Nov. 2, 2020, 1:42 PM), <https://www.vox.com/recode/21546119/trump-conspiracy-theories-election-2020-coronavirus-voting-vote-by-mail>; see also Jonathan Lai, *Trump campaign brings new U.S. Supreme Court challenge over Pennsylvania’s 2020 election*, PHILA. INQUIRER (Dec. 20, 2020), <https://www.inquirer.com/politics/election/trump-appeals-pa-supreme-court-2020-election-decisions-20201220.html> (noting Donald Trump’s “repeated use of baseless conspiracy theories to attack” the 2020 election).

543. See Steve Gorman, *Factbox: Bombings, shootings, beatings – U.S. Capitol’s history of violence*, REUTERS (Jan. 7, 2021, 4:44 PM), <https://www.reuters.com/article/domesticNews/idUSKBN29D03F?il=0>.



Rule of Law, voting rights, and democratic norms and institutions.<sup>544</sup> In 2020, then-President Trump repeatedly and notoriously downplayed the deadly threat posed by the COVID-19 pandemic<sup>545</sup> even as he held large campaign rallies that put scores of Americans—indeed, his own supporters—at risk of contracting the coronavirus.<sup>546</sup> And the brazen rioting at the U.S. Capitol, which so outraged American citizens, took place on January 6, 2021, under Donald Trump’s watchful eyes at the tail end of his presidency as he so desperately tried to intimidate his own vice president, pressure members of Congress, and cling to power.<sup>547</sup>

Just as Alabama Governor George Wallace will always be associated with racism and segregation<sup>548</sup> and U.S. Senator Joseph McCarthy with demagoguery and fear-mongering,<sup>549</sup> Donald Trump—only the third U.S. president in history to be impeached by the U.S. House of Representatives and the first to be impeached twice<sup>550</sup>—will be remembered for his constant lies and self-dealing, authoritarian impulses and associations with hate groups, and his many and varied abuses of power. As one news story aptly emphasized:

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544. Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 7–8 (2020) (“Since 2017, the Republican assault on voting rights at the state level has been supplemented by President Donald J. Trump’s attack on the basic norms and institutions of democracy at the national level. President Trump attacks the press as ‘the enemy of the people’; assails federal judges who invalidate his Administration’s policies or incarcerate his former political associates; politicizes law enforcement, intelligence, and other sectors of the federal government; uses the presidency for personal gain; slyly encourages violence; makes racist statements and enacts racist policies; systematically lies; erodes government transparency; expresses admiration for foreign autocrats; and delegitimizes elections and political opposition”).

545. *Id.* at 102; Jordyn Phelps & Ben Gittleson, *Trump contracts coronavirus after downplaying risk for months. What next?*, ABC NEWS (Oct. 2, 2020, 1:28 PM), <https://abcnews.go.com/Politics/trump-contracts-coronavirus-downplaying-risk-months/story?id=73382906>.

546. Nadia Kounang, *Many counties that hosted Trump rallies had a significant increase in Covid-19 cases*, CNN (Oct. 29, 2020, 10:25 PM), <https://www.cnn.com/2020/10/29/health/covid-trump-rallies-counties-cases/index.html>.

547. *Capitol riots timeline: The evidence presented against Trump*, BBC NEWS (Feb. 13, 2021), <https://www.bbc.com/news/world-us-canada-56004916>.

548. MICHAEL T. MALY, BEYOND SEGREGATION: MULTIRACIAL AND MULTIETHNIC NEIGHBORHOODS 8 (2005) (“‘Segregation then, segregation tomorrow, and segregation forever,’ shouted George Wallace on a chilly Inauguration Day in 1963 in Montgomery, Alabama.”).

549. LARRY TYE, DEMAGOGUE: THE LIFE AND LONG SHADOW OF SENATOR JOE MCCARTHY (2020).

550. Benjamin Siegel et al., *Donald Trump becomes 3rd president in US history to be impeached*, ABC NEWS (Dec. 18, 2019, 6:46 PM), <https://abcnews.go.com/Politics/donald-trump-3rd-president-us-history-impeached/story?id=67787613>; Jacob Pramuk, *Trump becomes first president to be impeached twice, as bipartisan majority charges him with inciting Capitol riot*, CNBC (Jan. 13, 2021, 10:30 AM), <https://www.cnbc.com/2021/01/13/house-to-impeach-trump-for-inciting-capitol-riot.html>.

Donald Trump will be remembered as the first president to be impeached twice. He fed the myth that the election was stolen, summoned his supporters to Washington to protest the certification of the Electoral College vote, told them that only through strength could they take back their country, and stood by as they stormed the US Capitol and interfered in the operation of constitutional government.<sup>551</sup>

History, certainly, will judge Donald Trump and his administration very harshly—and justifiably so. The hard part, of course, is how to undo all the damage that has been done by Trump and his followers and how to strengthen the Rule of Law and democratic institutions going forward to better protect human rights around the world in the years ahead.<sup>552</sup>

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551. Ritu Prasad, *US historians on what Donald Trump's legacy will be*, BBC NEWS (Jan. 19, 2021), <https://www.bbc.com/news/world-us-canada-55640427>.

552. Much debate over the Rule of Law has centered “on whether the definition should be thin and procedural—rule by law—or should inherently encompass thicker normative notions of fairness, equal protection, due process, and human rights.” Karen Hall, *Mitigating Administrative Barriers to Successful International Rule of Law Reform*, 9 WM. & MARY POL’Y REV. 41, 44 n.19 (2018). It is the latter, more robust conception of the Rule of Law—the one consistent with the U.N. definition of the concept—that must prevail, because a vision of the Rule of Law without consideration of equality, fairness, and the protection of civil liberties and individual rights would be morally bankrupt. *See id.* (“In the ‘thick v. thin’ debate, practitioners have almost universally accepted a more robust and thick definition. The United Nations now defines rule of law as ‘a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedure and legal transparency.’”).